Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Craig Blake; Jill Blake; Dan Anders; Brad Borowy; Brian Dalton; Melissa Dalton; John Ducas; Lynda Ducas; Brian Kavaras; David Kata; Constance Kata; John Novak; and Stacey Novak,
Petitioners,

v.

Fred Wright,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the common law qualified immunity defense afforded to public officials in claims based upon constitutional rights be extended to claims arising from violations of statutory rights?

PARTIES TO THE PROCEEDING

Petitioners are Craig Blake, Jill Blake, Dan Anders, Brad Borowy, Brian Dalton, Melissa Dalton, John Ducas, Lynda Ducas, Brian Kavaras, David Kata, Constance Kata, John Novak, and Stacey Novak. Petitioners are not corporate entities.

Respondent is Fred Wright. The City of Independence, Ohio is a defendant in the proceedings below but is not a party in this interlocutory appeal.

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The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 179 F.3d 1003 (6th Cir. 1999). A copy of the Opinion is included in the Appendix at Appendix A at *App. 1a-23a.* [1]

The Opinion of the District Court for the Northern District of Ohio has not been published and is included herewith in Appendix B at *App. 24a-43a.*

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on June 15, 1999. Petitioners filed a timely Petition for Rehearing or Rehearing *En Banc* which the United States Court of Appeals denied on August 19, 1999 (Appendix C at *App. 44a-45a*). This Petition for Writ of Certiorari is filed within ninety (90) days of the denial of the Petition for Rehearing or Rehearing *En Banc.* This Court's jurisdiction is invoked pursuant to *28 U.S.C. §§1254(1) and 2106.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Electronics Communication Privacy Act (Title III) 18 U.S.C. §2511(1) (1999)

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[1] Citations to "App." are to the appendix filed with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14(I).

Except as otherwise specifically provided in this chapter any person who–

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when–

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b) to (c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

***

18 U.S.C. §2520 (1999)

(a) In general.--Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) Relief.--In an action under this section, appropriate relief includes–

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.--(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and

has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of–

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) Defense.--A good faith reliance on–

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3) of this title permitted the conduct complained of; is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) Limitation.--A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

Ohio Wire-tap Act
Ohio Rev. Code §2933.52 (1999)

(A) No person purposely shall do any of the following:

(1) Intercept, attempt to intercept, or procure another person to intercept or attempt to intercept a wire, oral, or electronic communication;

(2) Use, attempt to use, or procure another person to use or attempt to use an interception device to intercept a wire, oral, or electronic communication, if either of the following applies:

(a) The interception device is affixed to, or otherwise transmits a signal through, a wire, cable, satellite, microwave, or other similar method of connection used in wire communications;

(b) The interception device transmits communications by radio, or interferes with the transmission of communications by radio.

(3) Use, or attempt to use, the contents of a wire, oral, or electronic communication, knowing or having reason to know that the contents were obtained through the interception of a wire, oral, or electronic communication in violation of sections 2933.51 to 2933.66 of the Revised Code.

(B) This section does not apply to any of the following:

***

(8) A police, fire, or emergency communications system to intercept wire communications coming into and going out of the communications system of a police department, fire department, or emergency center, if both of the following apply:

(a) The telephone, instrument, equipment, or facility is limited to the exclusive use of the communication system for administrative purposes;

(b) At least one telephone, instrument, equipment, or facility that is not subject to interception is made available for public use at each police department, fire department, or emergency center.

***

STATEMENT OF THE CASE

This action involves claims by several police officers and their wives (the Petitioners herein), against the former Chief of the Independence Police Department, Respondent, Fred Wright. Petitioners have alleged violations of the rights afforded by the Fourth and Fourteenth Amendments to the United States Constitution, the Federal Electronic Communications Privacy Act, *18 U.S.C.* §§*2510-2522* ("Title III"), and the Ohio Wire-tap Act, Ohio Rev. Code §*2933.52*. Their Complaint was filed in the United States District Court for the Northern District of Ohio on October 28, 1996. A copy of this pleading has been included herewith as Appendix D at *App. 46a-95a*. Therein Petitioners maintained *inter alia* that Respondent used a recording system which had been recently installed in the police station to monitor their personal telephone conversations. Departmental Memoranda

were attached to the Complaint attesting to Respondent's "voyeuristic" activities. *App. 59a-69a & 82a-95a.* Respondent and the City of Independence, Ohio were named as the only Defendants in the Complaint. *App. 48a.*

On June 16, 1997, Respondent filed a Motion to Dismiss in the District Court raising the defense of qualified immunity. This application was overruled in a decision issued July 16, 1997. *App. 24a-43a.* Respondent then filed his interlocutory appeal to the United States Court of Appeals on July 28, 1997. A decision was issued on June 15, 1999 reversing the District Court's ruling in part. *App. 1a-23a.* The panel ruled that Respondent was entitled to qualified immunity not only with respect to Petitioners' constitutional claims but also those claims arising under Title III, *18 U.S.C. §2520. App. 9a-21a.* Opinions from the United States Supreme Court indicating that this defense is unavailable for Title III claims were discarded as "dicta". *App. 19a-20a.* Moreover, the appellate court acknowledged that its ruling conflicted with a reported decision issued earlier in *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998). *App. 17a-18a.* Petitioners' ensuing Motion for Rehearing or Rehearing *En Banc* was summarily denied on August 19, 1999. App. *44a-45a.*

ARGUMENT FOR GRANTING WRIT

The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with a decision of the District of Columbia Circuit and inappropriately extends the qualified immunity doctrine in a manner which has never before been attempted.

The Court of Appeals ruling represents an unprecedented extension of the qualified immunity doctrine. Neither the Court nor the parties has identified any judicial authorities holding that the common law defense of qualified immunity can be invoked by public officials being sued for violation of statutory (as opposed to constitutional) rights and privileges. Notwithstanding a published opinion of the United States Court of Appeals for the District of Columbia to the contrary, the appellate court reversed the district court on the basis of a defense that had never been incorporated into Title III by Congress. This Court should take this opportunity to examine this conflict between two (2) circuits and clarify this frequently litigated area of the law.

Prior to the Sixth Circuit's ruling in this case, the qualified immunity defense had been limited to causes of action based upon constitutional rights violations. Stated simply, the qualified immunity defense shields governmental officials from civil damages in their individual capacity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S.635, 638, 107 S. Ct. 3034, 3038, 97 L.Ed.2d 523, (1987). One of the concerns that prompted the adoption of this judicial principle was that the evolving nature of the sometimes esoteric rights bestowed by the Constitution could not be predicted by government

officials performing day-to-day functions. *See Davis v. Scherer,* 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L.Ed.2d 139, (1984); *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396, (1982). In the years that followed the development of the qualified immunity doctrine, neither this nor any other Court felt the need to fashion such a common law defense against claims arising from statutes enacted by Congress.

The Sixth Circuit's startling decision is based in large part upon this Court's observation in *Harlow*, 457 U.S. at 818, that public officials are immune from liability when their actions do not violate "clearly established statutory or constitutional rights." *App. 16a.* It is no accident that no other jurist has interpreted this language similarly in the seventeen (17) years that *Harlow* has been scrutinized by the Courts. All this passage means is that a public official is not acting in good faith, and the qualified immunity defense will not be available to defeat a constitutional rights claim, when the public official violates "clearly established statutory or constitutional" law. This is not the same as saying that the defense will apply to civil claims arising under both constitutional and statutory law. Since *Harlow* involved claims that constitutional rights had been violated, this Court plainly was not considering whether to extend the qualified immunity doctrine to lawsuits based upon statutory prohibitions.

Undoubtedly, the Sixth Circuit's Opinion will soon become the leading authority throughout the United States for the argument that the qualified immunity defense is available against claims brought against government officials in their individual capacities under the Federal Electronic Communications Privacy Act, *18 U.S.C. §§2510-2522* (Title III). Indeed, the language set forth in this published decision

is broad enough to imply that this defense can be invoked with respect to any federal statute, including the Civil Rights Act of 1964, The Americans with Disabilities Act of 1990, The Age Discrimination in Employment Act of 1967, and The Fair Housing Act of 1968. It will only be a matter of time before public officials are routinely arguing that their good faith misunderstanding of these statutes renders them immune from liability.

The statutory defense that was incorporated into Title III is markedly different than the common law qualified immunity defense that the Sixth Circuit has invoked to dismiss part of Petitioners' claim. As originally enacted, Title III states that a defendant's "good faith" reliance upon a "statutory authorization" is a valid defense. *18 U.S.C. §2520(d)(1)*. Respondent's position is that such "authorization" can be found in *Ohio Rev. Code §2933.52(B)(8)*, which contains an exception in the Ohio Wire-tap Act for the monitoring of police department phone lines that are limited to "administrative" use. Petitioners intended to present evidence establishing both that Respondent failed to act in "good faith" and the phone lines he tapped were not strictly "administrative". The issue ultimately would have had to have been resolved by the trier of fact.

In its ruling, the Sixth Circuit has essentially rewritten Title III to provide that no public official will be subject to statutory liability until the enactment becomes "clearly established" through judicial interpretation by the courts. The panel never suggested that the legislation was ambiguous in a traditional sense but simply held that Respondent was entitled to qualified immunity as a result of the "dearth" of case law addressing the statutory exceptions that Respondent had cited. *App. 21a*. From the perspective of public officials, this is a wonderful ruling. They have essentially been granted a "free

pass" to violate the statutory rights of others until enough courts have reviewed and "clarified" the law in their reported opinions. It could be years before the prohibitions adopted by Congress apply to public officials.

Apart from establishing a new affirmative defense that Congress never authorized, this precedent will permit government officials to pursue interlocutory appeals in cases where such remedies were otherwise unavailable. Any time a public official loses a Motion to Dismiss or a Motion for Summary Judgment in a case alleging a violation of a statutory right, the proceedings can be potentially delayed for years as the qualified immunity defense is litigated on appeal. This would not be a concern if governmental officials were limited to the defenses specifically set forth in the statutes since interlocutory appeals are generally unavailable in such circumstances.

Moreover, extension of the qualified immunity defense to claims of statutory rights violations will create an unfair dichotomy. Individuals who are not government officials will still be potentially liable for infringing the statutory rights of others and will not have the benefit of the qualified immunity defense fashioned by the Sixth Circuit. Even though the law may not be "clearly established" at the time, they will be limited to the defenses specifically adopted by Congress. On the other hand, government officials engaging in precisely the same misconduct will, in all likelihood, be able to secure an early exit from the lawsuit by arguing that they had no reason to believe they were breaking the law. This was not a problem when the qualified immunity defense was limited to Bivens and §*1983* actions since the only individuals subject to such suits, except in limited instances, were government officials.

The notion that Congress can pass legislation and yet the law will not be "clearly established" until thoroughly reviewed by the courts threatens the very integrity of the legislative branch of government. It is evident from this Court's decision of June 15, 1999 that the panel did not believe that the prohibitions set forth in Title III against illegal wire-taps were vague or unclear. It is a matter of record that this statute has frequently been employed to secure convictions of, and civil damages against, violators. Given that common citizens are held to the clear and unambiguous provisions set forth therein, it makes no sense to allow a governmental official to escape liability because he or she had a good faith belief that he or she was not doing anything wrong.

Legislative enactments which are clear in their terms do not need to be "interpreted" by the courts and are expected to be enforced as written. *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 792 (6th Cir. 1996); *In re Davis*, 989 F.2d 208, 210 (6th Cir. 1993). If governmental officials believe that a statute is so vague that its terms cannot be readily understood, the law already allows them to challenge its enforceability under the principles of due process. *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L.Ed.*2d 322, (1926); Colautti v. Franklin*, 439 U.S. 379, 390-391, 99 S. Ct. 675, 683, 58 L.Ed.2d 596, (1979). Since this avenue of relief is not available to government officials charged with violating constitutional rights, it makes sense that the qualified immunity doctrine would be created by the courts as a counterpart to the "void for vagueness" defense that applies to statutes.

If this Court intends to allow the qualified immunity defense to be invoked with respect to statutory rights, then the application of the defense should be limited to those instances

when the statute is ambiguous. This Court should not tolerate the idea that a statute can be sufficiently clear to justify criminal penalties against violators and yet so unclear as to allow government officials committing the same misconduct to escape liability. There may be no more familiar maxim than the venerable adage that ignorance of the law is no defense. *Fultz v. Gilliam*, 942 F.2d 396, 404 (6th Cir. 1991); *United States v. Wuliger*, 981 F.2d 1497, 1502 (6th Cir. 1992). If a statute has been duly enacted, has been properly published, and is not void for vagueness, then public officials should be liable for violations thereof just like any other citizen regardless of whether they had an objectively reasonable belief that their actions were lawful.

CONCLUSION

By all appearances, the Opinion of the Sixth Circuit Court of Appeals is the first to dismiss a statutory rights claim by invoking the common law qualified immunity defense that was developed for constitutional rights claims. Notwithstanding the substantial litigation in this area of the law over the last several decades, no other court has taken this revolutionary position. At least one other Circuit has squarely held to the contrary. This Court should therefore issue the Writ of Certiorari and proceed to reverse the decision of the appellate court. Otherwise, public officials will be afforded a new defense against statutory causes of action that the drafters of the legislation may have never envisioned.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed June 15, 1999]

No. 97-3907

Appeal from the United States District Court for the Northern District of Ohio at Cleveland

CRAIG BLAKE; JILL BLAKE; DAN ANDERS; BRAD BOROWY; BRIAN DALTON; MELISSA DALTON; JOHN DUCAS; LYNDA DUCAS; BRIAN KAVARAS; DAVID KATA; CONSTANCE KATA; JOHN NOVAK; STACEY NOVAK,	)
Plaintiffs-Appellees,	)
v.	)
FRED WRIGHT,	)
Defendant-Appellant.	)

Before: KENNEDY and RYAN, Circuit Judges; HACKETT, District Judge.*

OPINION

KENNEDY, Circuit Judge. Defendant Fred Wright appeals the district court's denial of his motion to dismiss based on qualified immunity in this action alleging Wright recorded Plaintiffs' private telephone conversations and monitored them without their consent or knowledge in violation of their constitutional right to privacy in wire communications under the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983, the Federal Electronic Communications Privacy Act, otherwise commonly known as Title III of the Omnibus Crime Control Act under 18 U.S.C. §§ 2510-2522 ("Title III"),[1] and the Ohio wiretap statute, Ohio Rev. Code Ann. §2933.52(A). Wright responded to the charges filed against him in his individual capacity by claiming qualified immunity to the federal charges and filed a Motion to Dismiss the claims against him pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 16, 1997, the district court denied Wright qualified immunity. For the reasons that follow, we now REVERSE in part and AFFIRM in part.

---

* The Honorable Barbara K. Hackett, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] Congress revised Title III of the Omnibus Crime Control and Safe Streets Act, which now is known as the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521. Title I amended Title III and now governs the use of wiretapping. For the purposes of this case, we refer to the Act as Title III for the sake of convenience.

I.

The Ohio wiretap statute allows interception of telephone communications into and out of a police department if the telephone lines are limited to use for administrative purposes and at least one other unrecorded telephone line is available for private conversations.[2] On June 11, 1996, the City of Independence, Ohio, by way of a written Resolution passed in a public session, purchased a DigiVoice, Inc. Digital Recording system to use in the city's police and fire

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[2] The Ohio statute prohibits any person from intercepting or using a wire, oral, or electronic communication, but it excludes police departments under certain circumstances, as stated in relevant part:

> (B) This section does, not apply to any of the following:
>
> * * *
>
> (8) A police, fire, or emergency communications system to intercept wire communications coming into and going out of the communications system of a police department, fire department, or emergency center, if both of the following apply:
>
> (a) The telephone, instrument, equipment, or facility is limited to the exclusive use of the communication system for administrative purposes;
>
> (b) At least one telephone, instrument, equipment, or facility that is not subject to interception is made available for public use at each police department, fire department, or emergency center.

Ohio Rev. Code Ann. § 2933.52 (West 1999).

departments. On July 23, 1996, at the direction of ex-Chief of Police Wright, the system was installed to record all incoming and outgoing telephone calls at the Independence Police Department. In accordance with the Ohio wiretap statute, a pay phone in the police department and ex-Chief Wright's phone were excluded from the monitoring device. Plaintiffs allege that prior to the new DigiVoice system, the police department had monitored only "emergency lines" and ex-Chief Wright had approved and followed a departmental policy that permitted the officers to use the non-emergency lines for personal calls. The system, as installed, did not contain an audible or regular tone to alert callers that their conversations were being recorded.

On August 2, 1996, Plaintiff Blake allegedly overheard Wright playing a recording in his office of a personal telephone call Blake had conducted on a non-emergency line. Subsequently, on August 7, 1996, the Department issued an e-mail memorandum that notified employees that all personal telephone calls on non-emergency lines would be monitored and recorded. On August 8, 1996, upon recommendation of the Cuyahoga County prosecutors, the system was disconnected from the non-emergency lines.

On October 28, 1996, Plaintiffs filed this action against Wright and the City of Independence. Wright responded in his individual capacity by asserting qualified immunity, claiming that it was reasonable for him to conclude that the Ohio wiretap statute authorized the installation of the recording system within the meaning of the "statutory

authorization" exception of Title III.[3] Consequently, Wright claimed it was not clearly established that installing a recording system on the police department's phone lines and tapping those phone lines violated either the Fourth Amendment or Title III and he was thus entitled to qualified immunity under both counts. We address his arguments in turn.

II.

Qualified immunity is an affirmative defense that extends to government officials performing discretionary functions. *Harlow v. Fitzgerald,* 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The Supreme Court crafted the qualified immunity defense "to protect [public officials] 'from undue interference with their duties and from potentially disabling threats of liability.'" *Elder v. Holloway,* 510 U.S. 510, 514, 114 S. Ct. 1019, 1022, 127 L.Ed.2d 344 (1994) (quoting *Harlow,* 457 U.S. at 806, 102 S. Ct. at 2732). Under this judicially created exception,

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[3] 18 U.S.C. §2520(d)(1) states that an individual who relies in good faith on "a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization" has a "complete defense against, any civil or criminal action" brought under Title III. Further, we note that the installation of the recording system may fall within the law enforcement exception under Title III, although Wright does not make this argument on appeal. The exception, 18 U.S.C. §2510(5)(a)(ii), precludes from its definition of "electronic, mechanical or other device. . . any telephone or telegraph instrument, equipment, or facility, or any component thereof, . . . being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties."

government officials are immune from civil liability when acting in their official capacities if their actions do "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818; *see also Anderson v. Creighton,* 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L.Ed.2d 523 (1987) ("Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action. . . assessed in light of the legal rules that were 'clearly established' at the time it was taken.").

We review a district court's denial of qualified immunity de novo. *Greene v. Reeves,* 80 F.3d 1101, 1104 (6th Cir. 1996); *Thomas v. Whalen,* 51 F.3d 1285, 1289 (6th Cir. 1995). The defendant bears the burden of pleading the defense, but the plaintiff must show that the defendant is not entitled to qualified immunity. *Wegner v. Covington,* 933 F.2d 390, 392 (6th Cir. 1991). Supreme Court precedent dictates that courts must resolve immunity questions at the earliest possible stage of litigation because qualified immunity is an immunity from suit rather than an affirmative defense, *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S. Ct. 534, 536, 116 L.E.2d 589 (1991), and thus a party may immediately appeal a district court's denial of qualified immunity. *See Behrens v. Pelletier*, 516 U.S. 299, 307, 116 S. Ct. 834, 839, 133 L.Ed.2d 773 (1996) ("[A]n order rejecting the defense of qualified immunity at either the dismissal state or the summary judgment stage is a 'final judgment' subject to immediate appeal."); *Johnson v. Jones,* 515 U.S. 304, 313, 115 S. Ct. 2151, 2156, 132 L.Ed.2d 238 (1995); *Mitchell v. Forsyth*, 472 U.S. 511,530, 105 S. Ct. 2806, 2817, 56 L.E.2d 411 (1985).

In order to determine whether qualified immunity applies, a twofold inquiry is necessary. *Greene,* 80 F.3d at 1104. First, the court must examine whether the alleged constitutional or statutory violations were "clearly established" at the time of the alleged violations. "A right is clearly established if there is binding precedent from the Supreme Court, the Sixth Circuit, or the district court itself, *Bush v. Rauch,* 38 F.3d 842, 847 (6th Cir. 1994), or case law from other circuits which is directly on point." *Barrett v. Harrington,* 130 F.3d 246, 264 (6th Cir. 1997) (citing *Cameron v. Seitz,* 38 F.3d 264, 272-73 (6th Cir. 1994)). Although the absence of a case on point does not necessarily endow a public official with public immunity, "when this court can uncover only some generally applicable principle, its specific application to the relevant controversy must again have been 'clearly foreshadowed by applicable direct authority.'" *Summar v. Bennett,* 157 F.3d 1054, 1058 (6th Cir. 1998). Further, "[t]he contours of the fight [must be] sufficiently clear that a reasonable official would understand that what he doing violates that right." *Anderson,* 483 U.S. at 640, 107 S. Ct. at 3039 (citations omitted). Although the very action in question need not previously have been held unlawful, "in light of the pre-existing law the unlawfulness must be apparent." *Id.*

Once it is determined that the fight is clearly established, the court then must decide whether a reasonable person in the defendant's position would have known that his or her actions violated clearly established rights.[4] *Greene*, 80

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[4] The second part of the analysis flows from the first and thus an appellant faces a more difficult challenge to show the reasonableness of his or her conduct when the law is clearly established. This conclusion flows from the Supreme Court's

F.3d at 1104. Such a test reflects an objective standard, making the official's subjective intent irrelevant. *Crawford-El v. Britton,* 523 U.S. 574, 118 S. Ct. 1584, 1592, 140 L.Ed.2d 759 (1998). Further, a defendant appealing the denial of qualified immunity must accept the facts alleged by the plaintiff for purposes of the appeal. *See Berryman v. Rieger,* 150 F.3d 561, 563 (6th Cir. 1998). Because we review interlocutory appeals concerning qualified immunity on purely legal grounds and leave all factual issues for trial, *Johnson,* 515 U.S. at 313-18, 115 S. Ct. at 2156-58, a ruling in the defendant's favor is inappropriate if a genuine issue of material fact exists as to whether the defendant committed acts that allegedly violated clearly established rights. *Buckner v. Kilgore,* 36 F.3d 536, 540 (6th Cir. 1994). Against this backdrop, we turn to the instant case.

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statements in *Harlow:*

> If the law was clearly established, the immunity defense normally should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known of the relevant legal standard, the defense should be sustained.

Harlow, 457 U.S. at 818-19, 102 S. Ct. at 2738.

A.

We first examine whether Wright is entitled to qualified immunity under the Fourth Amendment[5] because the law was "clearly established" that Plaintiffs had a reasonable expectation of privacy in their phone calls at the time of the alleged recordings in 1996. The district court found that "at the time Wright took his actions, a clearly established legal rule existed that he could not intercept private telephone communications without first obtaining a warrant, absent some exception to the warrant requirement." Although we acknowledge that the Fourth Amendment warns of inherent dangers with wiretapping, we agree with Wright that the case law, when examined with the relevant Ohio statute, was sufficiently uncertain regarding the unlawfulness of

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[5] Plaintiffs alleged a violation of 42 U.S.C. §1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Plaintiffs bring their §1983 claim under the Fourth Amendment, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

implementing the DigiVoice system in a police department's official phones in Ohio.

Federal case law has specifically delineated a fundamental right to privacy in wire communications based on the Fourth Amendment. *See Berger v. New York,* 388 U.S. 41, 87 S. Ct. 1873, 18 L.Ed.2d 1040 (1967); *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967) (eavesdropping devices without a warrant may violate the Fourth Amendment when the speaker has a reasonable expectation of privacy). In *Katz,* the Court reaffirmed *Berger* and held that the government cannot record private conversations without a valid warrant or proper authorization when the speaker has a reasonable expectation of privacy. 389 U.S. at 351-52. Based on the pleadings, Plaintiffs have made an initial showing and created an issue of fact as to whether they had a reasonable expectation of privacy in their personal phone calls because of the city's policy that they could use the police department non-emergency phones for personal calls. Even though the city had announced the plan to install the recording device, whether Plaintiffs knew or should have known of the new system remains a question for the finder of fact. Thus, under *Katz* and its progeny, Plaintiffs have alleged a reasonable expectation of privacy in their personal phone calls.

Wright makes two arguments to overcome *Katz* and show that he did not violate any clearly established rule. First, he contends that although the case law broadly establishes that government use of electronic surveillance on suspects implicates the Fourth Amendment, it does not imply that the installation and use of the recording system on the phones in a workplace setting such as a police department

necessarily constitutes a Fourth Amendment violation. Thus, he argues Plaintiffs did not have a reasonable expectation of privacy in their phone calls, or at least it was not clearly established that they did.

Stated broadly, workplaces or commercial settings often are subject to less protection than dwellings. *See O'Connor v. Ortega,* 480 U.S. 709, 718, 107 S. Ct. 1492, 1501, 94 L. Ed. 2d 601 (1987). In *O'Connor*, the Supreme Court stated that "operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement agent." 480 U.S. at 717. The plurality decision determined that although employees have an expectation of privacy in their workplace, that expectation is not without limits and that "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718. Although *O'Connor* speaks to workplace settings and may have relevance here, the Court specifically addressed employees' expectation of privacy, in their offices, desks, and file

cabinets in their workplaces.[6] Nothing in the case addressed wire recordings.

Wright also refers to two factually similar Illinois cases to dispel Plaintiffs' expectation of privacy. In *Jandak v. Village of Brookfield,* 520 F. Supp. 815 (N.D. Ill. 1981), the district court found that a police officer and his companion who talked to one another on a tapped police department phone line could not prevail under Title III because the wiretapping was in the course of the police chief's duties and the police officer "should have known that calls on the line he used were being monitored." *Id.* at 824-25. *Jandak,* however, concerned a specific statutory exception under Title III and only obliquely discussed the parties' expectation of privacy. In *Abbott v. Winthrop Village,* 953 F. Supp. 931 (N.D. Ill. 1994), a police chief charged with surreptitiously monitoring employees' phone conversations was found to have violated clearly established federal and statutory law. *Id.* at 937-941. The police chief in *Winthrop* had distributed a written statement to the police officers that confirmed their

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[6] A plurality of the Justices determined that "[b]alanced against the substantial government interests in the efficient and proper operation of the workplace are the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts." *O'Connor*, 480 U.S. at 725. Thus, the Court imposed a "standard of reasonableness under all the circumstances" on employers who search employee workplaces. *Id.* at 725-26. Justice Scalia, concurring, limited his holding to "special needs" evident in government employment permitting the government to "retrieve work-related materials or to investigate violations of workplace rules . . . [and] do not violate the Fourth Amendment." *Id.* at 732. The four dissenting Justices refuted the "special need" in the case to search the defendant"s office and held that the typical Fourth Amendment analysis should apply to the case. *Id.* at 743.

calls would not be recorded, but such a distinction proves unconvincing here, particularly when Plaintiffs' have alleged that Wright at least verbally assured them that their personal calls would not be monitored and, at this stage of the litigation, we must accept Plaintiffs' allegations to be true.[7] Neither case answers the question presented here.

However, Wright posits a second basis for qualified immunity in view of the provision of the Ohio wiretap statute, Ohio Rev. Code Ann. §2933.52(B)(8), that allows interception of telephone communications into and out of a police department so long as the telephone line is limited to use for administrative purposes and at least one other telephone line is available for private conversations. Wright contends that a reasonable officer acting in good faith could have perceived that he or she could implement the DigiVoice system within the confines of this statutory exception since the phone system was for the administrative use of the police department. As a result, he claims that it was not clearly established that his actions were illegal.

We agree with Wright's argument. At the time that the city purchased the DigiVoice system, no state or federal case law existed to guide city officials specifically as to the Ohio statute's constitutionality. In order to refute Wright's contention, Plaintiffs point to *Lewis v. Village of Minerva,*

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[7] Wright also relies on *Uniformed Division Officers Assoc. Local 17 v. Brady,* No. Civ. 88-3377 (D.D.C. Dec. 23, 1988), for the proposition that police officers have diminished expectations of privacy. *Brady* concerned urinalysis testing, not wiretapping, and the court allowed such a test due to the safety and security of the public.

No. Civ. 2508 (N.D. Ohio July 12, 1996), in which a United States district court in Ohio held that a police chief who tapped city hall telephones in order to intercept the conversations of a police sergeant violated Title III and was not entitled to qualified immunity under §1983. The wiretaps in *Lewis,* however, did not involve the recording of calls on lines to and from the police department and were not for its administrative use. They were instead telephone lines that a police employee used to call other city offices. Further, even assuming that *Lewis* provided some guidance as to whether the law was "clearly established," the *Lewis* court released its unpublished decision only eleven days prior to the installation of the recording system, long after the city already had announced in a public meeting that it would implement the DigiVoice system and had spent approximately $42,000 to purchase the system. Plaintiffs have not cited and the court has not uncovered a case that, at the time of these allegations, interpreted the Ohio statute with respect to a police department's recording of its phones. Considering the dearth of case law with respect to this provision of the Ohio wiretap statute, we cannot say that the case law in this circuit clearly established that Wright's actions violated the law.

Finally, Plaintiffs contend that once Wright assured the officers that they could use the phones for personal calls, an informal policy existed guaranteeing their privacy when using the phones and Wright could not record phone conversations on those lines even for administrative purposes without notifying Plaintiffs. However, simply because Wright allowed Plaintiffs to use the phone lines for personal calls does not change the fact that the phone lines were "administrative" in nature. The phones were intended and used for the purpose of carrying out the business of the police

department. Their occasional use for personal calls does not change their nature. Moreover, the Ohio courts have not interpreted the term "administrative" under the Ohio wiretap statute and we do not find it necessary to do so for the purposes of this appeal. In sum, we hold that Wright is entitled to qualified immunity under §1983 because the law regarding the administrative monitoring of police phone lines was sufficiently unclear at the time of the alleged violations that a "reasonable" officer in Wright's position would not have known he was violating clearly established law.[8]

B.

Next we must determine whether Wright may claim qualified immunity with respect to Plaintiffs' claim that he violated Title III, 18 U.S.C. § 2511(1)(a)-(d), which makes it unlawful for any person to intentionally intercept, use, or

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[8] In their Complaint, Plaintiffs cite the Fourth and Fourteenth amendments to the United States Constitution as a basis for their claim under §1983. Wright moved for judgment on the basis of the Fourth Amendment and the district court did not address the Fourteenth Amendment claim in its decision. In his reply brief to this court, Wright claims that "[b]ecause there is a Fourth Amendment right to privacy and because Appellees list the Fourth Amendment before the Fourteenth Amendment, it appeared that Appellees were merely making a Fourth Amendment claim and listing the Fourteenth Amendment because that amendment makes the Fourth Amendment applicable to State and local entities." However, Plaintiffs claim a Fourteenth Amendment violation in their briefs to both the district court and this court. n their briefs, Plaintiffs seemingly assert that Wright violated their fundamental right to marital privacy. However, because we find that the law regarding the administrative provision of the Ohio wiretap statute is not clearly established, we find that Wright is entitled to qualified immunity under both the Fourth and Fourteenth Amendments.

disclose any electronic, mechanical, or other device to intercept any oral, wire, or electronic communication. The purpose of Title III was to prohibit all electronic surveillance and interceptions of oral and wire communications, except those specifically provided for in the Act. *See Fultz v. Gilliam,* 942 F.2d 396, 399 (6th Cir. 1991). Title III, however, provides a good faith exception to a civil or criminal action brought under the statute if the defendant relies in good faith upon "a statutory authorization" that allows him to implement an interception. *See* 18 U.S.C. §2520(d)(1).

Wright argues that he may assert qualified immunity under Title III because he relied on the Ohio wiretap statute's administrative exception, which, in turn, Wright claims is a "statutory authorization" within the meaning of Title III. We agree. Although the Supreme Court has not specifically held that qualified immunity may apply to Title III, the Court implied such a result in *Harlow* by explicitly granting public officials qualified immunity when their actions do not violate "clearly established *statutory* or constitutional rights." *Harlow,* 457 U.S. at 818 (emphasis added). Moreover, although few courts have squarely addressed this issue, some circuit courts have applied qualified immunity to a Title III claim or at least implied that they would do so. *See In re State Police Litigation,* 88 F.3d 111,125-29 (2d Cir. 1996) (implying qualified immunity would apply to both constitutional and Title III claims); *Davis v. Zirkelbach,* 149 F.3d 614, 619-20 (7th Cir. 1998), *cert. denied,* 119 S. Ct. 902 (1999); *see also Gorman v. Bartch,* 152 F.3d 907, 914-15 (8th Cir. 1998) (applying qualified immunity to a claim under the ADA). This court similarly has implied that defendants may assert qualified immunity to both Title III and constitutional claims, specifically a Fourth Amendment

violation, although the court did so with no discussion of the issue. *See Sinclair v. Schriber,* 916 F.2d 1109, 1111 (6th Cir. 1990).

In contrast, at least one circuit court has held that qualified immunity does not apply to Title III because the federal statute contains a good faith defense that applies equally to all citizens, although it is narrower in scope than qualified immunity. *See Berry v. Funk,* 146 F.3d 1003 (D.C. Cir. 1998); *see also Davis v. Gracey,* 111 F.3d 1472, 1481-84 (10th Cir. 1997) (implying that the good faith defense under the Electronic Communications Privacy Act, formerly Title III, and qualified immunity are separate defenses); *Newcomb v. Ingle,* 944 F.2d 1534, 1536 (10th Cir. 1991) (implying that Title III is a separate and distinct claim from §1983 qualified immunity); *but cf Kilgore v. Mitchell,* 623 F.2d 631, 633-34 (9th Cir. 1980) (holding that if a defendant meets the statutory good faith defense under Title III, then the defendant also sufficiently meets the standard for qualified immunity as a defense to Fourth Amendment violations); *Jacobson v. Rose,* 592 F.2d 515, 522-25 (9th Cir. 1978) (same).

Contrary to the conclusion of the *Berry* court, however, we find that simply because Title III provides a defense to wiretap violations does not necessary imply that qualified immunity, a judicially created exception to liability, does not apply to this federal statutory violation. The courts crafted qualified immunity to protect public officials from civil liability when they perform discretionary activities in their official capacity. Nothing in Title III itself or elsewhere indicates that public officials cannot claim qualified immunity in response to an alleged Title III violation. The *Berry* court

correctly pointed out that the good faith defense applies equally to all citizens who, in good faith, rely to their detriment on a court order or statutory authorization. *See id.* at 1013. But the court went further in stating that Congress intended that public officials receive the same defense as all other citizens. Such a holding runs counter to established qualified immunity precedent, for courts, by adopting qualified immunity as a defense for public officials only, have signaled that public officials indeed receive additional protection in responding to constitutional and statutory claims when ordinary citizens do not. In recognizing defenses of absolute and qualified immunity, the Supreme Court noted that such defenses existed at common law for judges, prosecutors and other public officials and concluded that in enacting §1983, Congress did not, by its silence, intend to remove those defenses. *See Pierson v. Ray,* 386 U.S. 547, 554-55 (1967). We would not strip a judge or prosecutor of absolute immunity because the claim related to a statutory violation and the statute provided an affirmative defense. By the same token, police officers and public officials performing governmental functions should not lose their qualified immunity because of an affirmative defense which might or might not protect them but would, in all events, require they be subject to extended litigation and deprive them of the benefits of qualified immunity. Thus, we conclude that Congress did not intend to deprive public officials of their defense of qualified immunity when it enacted Title III.

Further, although we acknowledge that some Supreme Court precedent may indicate that qualified immunity may be unavailable to public officials under Title III, we find the Court's dicta less than clear. In *Mitchell,* the Supreme Court discussed the Attorney General's claims of absolute and

qualified immunity with respect to the warrantless wiretapping of the telephone of a member of an antiwar group. After concluding that the Attorney General was not entitled to absolute immunity for "actions undertaken in the interest of national security," the Supreme Court reversed the district court's denial of qualified immunity. *Mitchell,* 472 U.S. at 536. In a footnote, the Court stated:

> The district court held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, not a prosecutorial function for which absolute immunity was recognized. The Court then concluded that the tap violated the Fourth Amendment and that Mitchell was not immune from liability for this violation under the *Harlow* standard. Had the court not concluded that the wiretap was indeed a national security wiretap, the qualified immunity question would never have been reached, for the tap would clearly have been illegal under Title III, and qualified immunity hence unavailable.

Mitchell, 472 U.S. at 535 n. 13. In dissent, Justice Brennan interpreted this language of the opinion to imply that "the trial court should have decided the legality of the wiretap under Title III before going on to the qualified immunity question, since that question arises only when considering the legality of the wiretap under the Constitution." *Id.* at 558 (Brennan, J., dissenting).

Although Justice Brennan presents a logical and legitimate reading of the majority's opinion, we find this dicta ambiguous. Alternatively, the majority opinion may imply that the district court in *Mitchell* could not reach the qualified immunity question because the law with respect to Title III was clearly established, not because qualified immunity never applied to a Title III claim. We base this interpretation partly on the specific language in *Harlow* that refers to "statutory and constitutional violations," and on the Supreme Court's statement, albeit also dicta, in *Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 82 L.Ed.2d 139 (1984). In *Davis,* the Court held that "public officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Id.* at 194. In a footnote that further explains its holding, the Court stated that "officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some *other* statute or regulation." *Id.* at 194 n. 12. The language of this footnote, although ambiguous, seemingly implies that public officials may claim qualified immunity when sued for statutory violations. At best, the tension and ambiguity surrounding *Mitchell* and *Davis* illustrate the difficulty of our task in this case.

Ultimately, we believe that the Court intended to apply qualified immunity to statutory violations and we thus hold that a defendant may claim qualified immunity in response to a Title III claim. We fail to see the logic of providing a defense of qualified immunity to protect public officials from personal liability when they violate constitutional rights that are not clearly established and deny them qualified immunity

when they violate statutory rights that similarly are not clearly established.

Turning again to the facts of this case, we must examine whether the law surrounding Title III was clearly established to put Wright on notice that his actions violated Title III. Wright claims that he relied on the exception to Title III because he believed the Ohio wiretap statute "authorized" him to record the police department's phone lines. As we stated above, the dearth of law surrounding the administrative exception within the Ohio wiretap statute fails to clearly establish whether Wright's activities violated the law. This court has not discovered case law that discusses the good faith defense of Title III with respect to a similar statutory provision, let alone the administrative exception of the Ohio statute. Nor has Ohio or federal law fully explained the meaning of "statutory authorization" under Title III. *See, e.g., United States v. Wulinger*, 981 F.2d 1497, 1507-08 (6th Cir. 1992) (rejecting defendant's argument that Ohio Code of Professional Responsibility was a court order or statutory authorization that allowed him to use secretly recorded tapes in court proceedings). Consequently, we hold that Wright is entitled to qualified immunity under Title III.

III.

Plaintiffs also allege that Wright "surreptitiously monitored them. . . through other electronic devices and equipment." As the district court pointed out, Plaintiffs' pleadings and affidavits allege that Wright also may have done the following: (1) Chief Wright may have installed intercoms disguised as carbon monoxide detectors; (2) Chief Wright may have used these intercoms to eavesdrop on conversations

that plaintiffs reasonably believed were private; and (3) Chief Wright may even have monitored the plaintiffs' conversations from his home, via telephone modem." With respect to these allegations, the Ohio wiretap statute provides no exception for Wright's conduct. *Berger, Katz* and their progeny imply that such surveillance, in the absence of a warrant or other reasonable interpretations of the law, violates the Fourth Amendment. Wright has cited no case law that suggests such calculative monitoring of employees is constitutionally 'permissible. We find that Wright's actions could not reasonably fall within the protection of the Ohio wiretap statute and, assuming the allegations in Plaintiffs' complaint to be true, Wright may have violated Plaintiffs' rights under §1983, Title III, and the Ohio wiretap statute. Thus, Wright is not entitled to qualified immunity with regard to these claims and we leave these issues for the district court to resolve on remand.

IV.

At this juncture, the parties present us only with the limited issue of whether the district court improperly denied Wright's claim of qualified immunity. We hold that the district court erred when it found that it was not objectively reasonable for Wright to conclude that he did not violate clearly established law by installing and using a recording system on the police department's phones as permitted by Ohio law. However, we affirm the district court's finding that proceedings may continue on the remaining allegations. Because qualified immunity presents a question of law, we need not remand to the district court on that issue. Accordingly, we REVERSE in part, AFFIRM in part, and

REMAND to the district court for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed July 16, 1997)

No. 1:96 CV 2337

CRAIG BLAKE, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
FRED WRIGHT, et al.,	)
Defendants.	)
	)

JUDGE O'MALLEY
OPINION AND ORDER

This action is brought against the City of Independence ("City") and the City's ex-Chief of Police, Fred Wright, by eight City police officers and five of their spouses. Plaintiffs assert Chief Wright and the City violated their constitutional rights by wiretapping their private telephone conversations over police department office telephone lines. Currently pending are the following motions: (1) defendants' motion to strike certain appendices to the complaint and to place certain documents under seal (docket no. 3); (2) defendants' motion for judgment on the pleadings (docket no. 8); and (3)

Wright's motion for a more definite statement, or to dismiss (docket no. 9). For the reasons stated below, the motion to strike is **DENIED**, the motion to place documents under seal is **DENIED**, the motion for judgment on the pleadings is **DENIED**, the motion for more definite statement is **DENIED AS MOOT**, and the motion to dismiss is **DENIED**.

I. Wright's Motion for More Definite Statement

Chief Wright notes that nowhere in the complaint do plaintiffs state explicitly whether they are suing him in his individual capacity. Wright asks that the Court order plaintiffs to state more definitely whether they sue him in his official capacity only or in his individual capacity as well, so that he can answer the complaint appropriately. In response, plaintiffs write that they "hereby definitively state that they are seeking relief from Chief Wright personally for damages due as a result of his civil rights violations. . . and illegal wire taps." Brief in Opposition at 1 (emphasis in original). Plaintiffs also note that, although they did not use the word "individually" in their complaint, the nature of the relief they requested against Wright and the arguments they made in their briefs give a clear signal that they are suing Wright in his individual capacity.

The Sixth Circuit has held that "plaintiffs seeking damages under §1983 [must] set forth clearly in their pleading that they are suing the state defendants in their individual capacity for damages, not simply in their capacity as state officials." Wells v. Brown, 891 F.2d 591,592 (6th Cir. 1989) (emphasis added). In Lovelace v. O'Hara, 985 F.2d 847 (6th Cir. 1993), the Sixth Circuit Court of Appeals

adopted the position of the dissent in Hill v. Shelander, 924 F.2d 1370 (7th Cir. 1991), which stated:

> where a complaint alleges that the conduct of a public official acting under color of state law gives rise to liability under Section 1983, we will ordinarily assume that he has been sued in his official capacity and only in that capacity. . . . If a plaintiff intends to sue public officials in their individual capacities or in both their official and individual capacities, he should expressly state so in the complaint.

Hill, 924 F.2d at 1379 (Coffey, J., dissenting) (quoting Kolar v. Sangaman County of the State of Illinois, 756 F.2d 564, 568-69 (7th Cir. 1985)) (emphasis added by Judge Coffey).

In this case, it is arguable whether plaintiffs alleged clearly in their complaint that they are suing Wright in his individual capacity. However, plaintiffs have stated explicitly in their briefs that they are suing Wright in his individual capacity, and Wright (assuming they were) has already moved to dismiss the individual capacity claims on the basis of qualified immunity. Thus, there is no question that Wright has received actual and timely notice that he is being sued in his individual capacity, and Wright has not suffered any prejudice from any supposed failure of the plaintiffs to make clear the exact nature of the claims they assert. As did Wright himself, the Court reads plaintiffs' complaint as suing

Wright in his individual and official capacities; accordingly, the motion for more definite statement is denied as moot.[1]

The Court addresses below, in section III. B of this opinion, Wright's arguments that, to the extent plaintiffs sued him in his individual capacity, those claims should be dismissed because he is qualifiedly immune.

II. Motion to Strike and to Place Documents Under Seal

Appended to plaintiffs' complaint, as exhibits, are three memoranda received by City Mayor Greg Kurtz and labeled "confidential." Two of the memoranda are written by Jeff Caldwell, a part-time deputy; the other memorandum is written by Lieutenants Dale Christ and John Nicastro. The memoranda discuss: (1) Chief Wright's decision to tape all communications made using police department telephone lines and radio bands; (2) the implementation of that decision; (3) complaints by police officers upon learning their "private" telephone calls had been intercepted; and (4) the morale problems Chief Wright's decisions caused.

Defendants ask the Court to strike these memoranda pursuant to Fed. R. Civ. P. 12(f), and further ask the Court to require all pleadings to be placed under seal. Rule 12(f) states that the Court "may order stricken from any pleading any insufficient defense or any redundant, immaterial,

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[1] To the extent that the Court should "ordinarily assume that [Wright] has been sued in his official capacity and only in that capacity," Hill. 924 F.2d at 1379 (Coffey, J., dissenting), the Court finds that this case is not "ordinary" because plaintiffs immediately made clear, and Wright himself assumed, that he was being sued in both his official and individual capacities.

impertinent, or scandalous matter." After reading each of the memoranda, however, the Court concludes that these documents contain no such material.

Defendants assert, in somewhat conclusory fashion, that the material discussed in the memoranda is redundant and impertinent and immaterial and scandalous. Although the defendants may find the information contained in the memoranda troublesome, or believe it to be inaccurate, it is certainly information that is: (1) not merely repetitive of the allegations contained in the complaint; (2) not disrespectful to the parties or the Court; (3) material to the claims and defenses raised in the lawsuit; and (4) not needlessly defamatory, insulting, or sensational. Moreover, while it may have been unnecessary for plaintiffs to attach these materials to their complaint to adequately state a claim, there is nothing in the Civil Rules that prohibits plaintiffs from attaching them -- as long as the documents are not subject to the provisions of Rule 12(f). See Fed. R. Civ. P. 10(c) (noting, to the contrary, that 'a copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes"). As such, the Court declines to strike the memoranda from the plaintiffs' complaint

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Further, the Court finds no valid basis to place any of the pleadings, or any other documents filed with the Court,[2]

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[2] Some or all of the parties are apparently laboring under the common misconception that the pending motions and responsive briefs are "pleadings." These documents are not pleadings. See Fed. R. Civ. P. 7(a, b) (defining "pleadings" and "motions and other papers"). The court declines to place the pleadings or any of the other documents discussed by the parties under seal.

under seal. The "First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." Richmond Newspapers, Inc. v. Virginia, 448 U.S. *555,* 599 (1980). This right of access to trials includes the "general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978) (footnote omitted). There exists a "strong presumption in favor of openness" to the public of court documents, for a number of compelling policy reasons. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983), cert denied, 465 U.S. 1100 (1984). Thus, "[j]udicial proceedings are not closed whenever the details are titillating, and open only when the facts are so boring that no one other than the parties cares about them." Matter of Grand Jury Proceedings: Krynicki, 983 F.2d 74, 78 (7th Cir. 1992).

Defendants argue that the memoranda and the motions discussing them should be placed under seal because the memoranda are "confidential internal investigatory memoranda of the Independence Police Department which identify by name innocent and uncharged individuals." This description makes it sound as though the memoranda discuss a criminal investigation and mention the names of victims, informants, witnesses, or uncharged suspects. Simply, the memoranda are not of this ilk. Rather, the memoranda are directed to the Mayor to inform him of serious morale problems in the City's police department. The first Caldwell memorandum does mention in passing that Caldwell had warned Chief Wright that Caldwell believed taping of the police officers' telephone conversations might be illegal. But this point is made to the Mayor only to highlight Caldwell's

feeling that Chief Wright did not care what Caldwell thought, or what his police force thought of him. Indeed, in his second memorandum, Caldwell makes it clear that he and other police officers were concerned with whether Chief Wright should continue to act as Chief, given his perceived intrusion into the officers' personal lives. Nowhere does the suggestion appear that any entity is undertaking a criminal investigation.

There is also evidence that some or all of the memoranda were "passed around" indiscriminately to City police officers as a matter of shared concern. Finally, defendants admit that the Mayor discussed much of the subject matter of the memoranda with the media. These facts make it clear that the memoranda are not "confidential law enforcement investigatory records" or documents discussing "confidential matters of the employer," as those terms are used in the sources cited by plaintiffs.

Defendants have not provided the Court with any overriding reason to ignore the strong presumption that the documents filed in this case should be available for public inspection. Accordingly, the Court declines to place any of the documents so far filed in this case under seal.

III. Motions to Dismiss and for Judgment on the Pleadings

Plaintiffs have brought three claims against defendants: (1) infringement of their Fourth Amendment fight to be free of unreasonable searches, in violation of 42 U.S.C. §1983; (2) violation of the Federal Wiretap Act, 18 U.S.C. §2510 et seq.; and (3) violation of the Ohio Wiretap Statute, Ohio Rev. Code §2933.52. Both defendants have moved for judgment on the pleadings as to all claims. In addition, Chief Wright

moves for dismissal of the claims against him in his individual capacity, on the basis of qualified immunity.

A. Judgment on the Pleadings

Both the City and Chief Wright move for judgment on the pleadings, pursuant to Fed. R. Civ. P. 12(c). "In considering such a motion, the court must accept all the factual allegations of the complaint as true." Paskvan v. City of Cleveland Civil Service Com'n, 946 F.2d 1233, 1235 (1991) (citing Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 51 (1941)). Taking the plaintiff's well-pleaded factual allegations as true, "if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then. . ., dismissal is proper." Forest v. United States Postal Serv., 97 F.3d 137, 139 (6th Cir. 1996). The "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993).

Regarding plaintiffs §1983 claim, defendants assert plaintiffs cannot prevail because, as a matter of law, they cannot show any search conducted by defendants was "unreasonable." The parties agree that, to succeed under §1983 based upon a Fourth Amendment violation, plaintiffs must show: (1) they had "an actual (subjective) expectation of privacy;" and (2) "the expectation [is] one that society is prepared to recognize as 'reasonable.'" United States v. Bailey, 628 F.2d 938, 941 (quoting Katz v. United States, 398 U.S. 347, 361 (1967) (Harlan, J., concurring)).

Defendants assert plaintiffs cannot show, as a matter of law, that they had a reasonable expectation of privacy in the telephone calls they made or received using the City's police department telephones, for several reasons. First, defendants argue that police officers generally have reduced expectations of privacy while at work by virtue of their membership in the police force. Defendants further argue that, because police departments commonly have systems that record telephone lines, the plaintiffs in this case could not reasonably expect their conversations over the City police department telephone lines to be private. Finally, defendants argue that Ohio law explicitly allows a police department to "intercept wire communications coming into and going out of [its] communications system" under certain circumstances, Ohio Rev. Code. §2933.52(B)(8), so the plaintiffs could not reasonably expect their telephone lines to be untapped.

These arguments are unavailing for the simple reason that, at this juncture, the Court must accept as tree plaintiffs' allegation that "Chief Wright approved and followed a department policy that permitted the officers to use the non-emergency [telephone] lines for personal calls," and he gave the plaintiffs reason to believe their telephone calls "would remain private and confidential." Complaint at ¶7.[3] That Chief Wright is authorized to tap the police department telephone lines does not necessarily mean he can do so even after indicating to the plaintiffs, that their personal calls on

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[3] That the memoranda attached to plaintiffs' complaint support this allegation -- by virtue of describing the surprise, shock, and anger of the police force upon learning the telephone lines were tapped -- reinforces the Court's determination that Wright's motion to strike is not well-taken.

those lines would remain personal. Thus, even accepting defendants' assertions that, regarding police officers at work, society is prepared to recognize as reasonable only limited expectations of privacy, the Court cannot say as a matter of law that society would not recognize as reasonable an officer's expectation of privacy in a telephone conversation over a line that his own Chief declared was available, and presumably safe, for private, personal calls.

Indeed, defendants' invocation of Ohio Rev. Code §2933.52(13)(8) confirms this position. The statute authorizes

> A police. . . communications system to intercept wire communications coming into and going out of the communications system of a police department.., if both of the following apply:
>
> (a) the [tapped] telephone [lines]. . . is limited to the exclusive use of the communication system for administrative purposes; and
>
> (b) at least one telephone [line]. . . that is not subject to interception is made available for public use at each police department.

These requirements ensure that, at a minimum, at least one telephone line is available for private, unmonitored use, protecting the privacy of both the public and the police department employees. Further, it is plain that police officers and visitors must know which single line is the one that is not

tapped -- otherwise, the requirements of §2933.52(B)(8)(a & b) are meaningless. For example, maintaining one untapped, private telephone line, but not telling callers which of several telephone lines is the one not tapped, does not comport with the clear intent of the statute. Thus, the Court rejects defendants' suggestion that merely keeping one untapped telephone line available, after having declared a number of such lines so available and then changing that policy unannounced, satisfies the requirements of the Ohio statute and makes plaintiffs' expectations unreasonable as a matter of law.

It may be that, as the facts are developed in this case, defendants can show beyond dispute that no promises (express or implied) were made regarding the sanctity of one or more of the telephone lines and that plaintiffs' expectations of privacy were unreasonable as a matter of law. Cf. PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 818-19 (D. N.J. 1983) (granting summary judgment on certain claims, because plaintiff police officers had no reasonable expectation of privacy in using "beeping" telephone lines, while denying summary judgment on other claims, because plaintiffs did have reasonable expectation of privacy in using other telephone lines). Accepting the allegations as true, however, as is required pursuant to defendants' Rule 12(c) motion, the Court cannot conclude that plaintiffs can prove no set of facts in support of their §1983 claim that would entitle them to relief. Accordingly, judgment on the pleadings as to plaintiffs' §1983 claim is denied.

Turning to plaintiffs' Federal Wiretap Act claim, defendants give two principle reasons why plaintiffs cannot prevail as a matter of law. First, defendants assert they have

a complete defense under the statute: they cannot be held liable "when the interception was done in good faith reliance on a statutory authorization." 18 U.S.C. §2520(d).[4] The statute defendants rely upon, however, is Ohio Rev. Code §2933.5203)(8); as noted above, the Court finds there is a substantial question whether the statute authorized all aspects of Wright's alleged actions. Further, there is a question of fact whether any reliance by Wright was in good faith, and plaintiffs have alleged it was not.[5]

Second, defendants contend they fall within the Federal Wiretap Act's "telephone extension exemption," which excludes from the definition of "electronic device" any equipment used "by an investigative or law enforcement officer during the course of his duties." 18 U.S.C. §2510(5)(a)(ii). Once again, this argument may prove well taken in the context of a summary judgment motion, but plaintiffs have alleged that Wright's actions were not "necessary for the normal course of operations at the [City] police department." Complaint at ¶29. It is unclear at this juncture whether Chief Wright intercepted plaintiffs' telephone conversations in the course of pursuing his legitimate duties, or, instead, in pursuit of illegitimate or personal purposes. Because the Court must accept plaintiffs'

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[4] To the extent plaintiffs assert the "good faith" language of this provision is tantamount to a statutory qualified immunity, the result is the same. See the Court's qualified immunity analysis, below.

[5] Indeed, plaintiffs specifically allege that Wright was informed, on at least one and possibly more occasions, that his actions were not consistent with the requirements of the Federal Wiretap Act, but that Wright chose to ignore these warnings.

allegations as true, the "telephone extension exemption" does not allow judgment under Rule 12(c).

To state a valid civil claim under the Federal Wiretap Act, plaintiffs must allege that the "individual defendants (1) willfully or intentionally, (2) intercepted or endeavored to intercept, (3) a wire, oral or electronic communication without the callers' consent." In re State Police Litigation, 888 F. Supp. 1235, 1262 (D. Conn. 1995), appeal denied, 88 F.3d 111 (2nd Cir. 1996). Plaintiffs have made the required allegations, and the Court cannot conclude that plaintiffs can prove no set of facts in support of their Federal Wiretap Act claim that would entitle them to relief. Accordingly, judgment on the pleadings as to this claim is also denied.

Finally, defendants restate their argument that they cannot be held liable under the Ohio Wiretap Statute because §2933.52(B)(8) authorized their actions. As noted above, the Court cannot say as a matter of law that merely keeping one untapped telephone line available, after having declared a number of such lines available and then changing that policy unannounced, satisfies the requirements of the Ohio statute. Because this is what plaintiffs allege defendants did, and because the Court must accept those allegations as true, judgment on the pleadings as to plaintiffs' Ohio Wiretap Statute claim is also denied.[6]

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[6] In their motion for judgment on the pleadings, defendants also argue that punitive damages are unavailable against the City. Because plaintiffs respond that they seek punitive damages only against Chief Wright in his individual capacity, the Court finds this issue moot.

B. Qualified Immunity

Chief Wright moves for dismissal of the claims against him in his individual capacity, on the basis of qualified immunity. Qualified or "good faith" immunity is an affirmative defense that is available to government officials performing discretionary functions. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Anderson v. Creighton, 483 U.S. 635, 639 (1987). "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action. . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson, 483 U.S. at 639 (citing Harlow, 457 U.S. at 818-19); Yates v. City of Cleveland, 941 F.2d 444, 446 (6th Cir. 1991). In ruling on a motion for judgment on the pleadings, a district court will consider the allegations put forth by the plaintiff, and "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell, 472 U.S. at 526.

The United States Supreme Court has elaborated on what is meant by "clearly established:"

> the contours of the fight must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the

> light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (citations omitted). The Sixth Circuit Court of Appeals adds that, in inquiring whether a constitutional right is clearly established, this Court is to "look first to decisions of the Supreme Court, then to decisions of [the Sixth Circuit Court of Appeals] and other courts within [the Sixth Circuit,] and finally to decisions of other circuits." Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991), cert. denied, 502 U.S. 1060 (1992).

The ultimate burden of proof is on the plaintiff to show the defendants are not entitled to qualified immunity. Wegener v. Covington, 933 F.2d 390, 392 (6th Cir. 1991). Defendants bear the initial burden of coming forward with facts to suggest they were acting within the scope of their discretionary authority during the incident in question. Id. Thereafter, the burden shifts to the plaintiff to establish that the defendants' conduct violated a right so clearly established that any official in defendants' positions would have dearly understood that they were under an affirmative duty to refrain from such conduct. Id. However,

> summary judgment would not be appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. . . . Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate

> clearly established rights. In either event, the case will then proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe v. Haydon, 853 F.2d 418, 426 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1989) (citations omitted). Accord, Brandenburg v. Cureton, 882 F.2d 211,215-16 (6th Cir. 1989).

Looking to the state of the law as it existed in August of 1996, when Chief Wright took the actions complained of, the Supreme Court had stated long before that "the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of the Fourth Amendment safeguards." United States v. United States District Court for the Eastern District of Michigan Southern Division, 407 U.S. 297, 313 (1972) (citing Katz v. United States, 389 U.S. 347 (1967) (footnote omitted)). Similarly, the Sixth Circuit Court of Appeals had explicitly recognized the "constitutional right to privacy in wire communications." United States v. Jones, 542 F.2d 661, 670 (1976); see United States v. Passarella, 788 F.2d 377, 379 (6th Cir. 1986) ("Katz protects a person's own conversational privacy from unjustifiable governmental intrusions"). Thus, it is fair to say that, at the time Chief Wright took his actions, a clearly established legal rule existed that he could not intercept private telephone communications without first obtaining a warrant, absent some exception to the warrant requirement.

Chief Wright makes two primary arguments that he did not violate this clearly established rule. First, he argues he

did not intercept any telephone communications that the plaintiffs could reasonably expect were private. For the reasons noted above, the Court must reject this argument at this time. Plaintiffs allege Wright indicated to them that the telephone lines they were using were available for personal calls. This allegation, if true, could give the plaintiffs a reasonable expectation that their conversations on those telephone lines were private. The Court does not find it objectively reasonable for a police chief to believe it is legal to tell his officers their office telephone lines are private, and then tap those telephone lines without prior notice. Taking plaintiffs' allegations as true, Chief Wright is not qualifiedly immune on the basis that the plaintiffs could not reasonably expect their conversations were private.

Chief Wright' s second argument presents a somewhat closer question: he asserts that he relied in good faith upon statutory exceptions to the warrant requirement applicable to police department telephone lines. Specifically, Chief Wright notes that the Ohio Wiretap Statute allows interception of telephone communications into and out of a police department so long as (1) the telephone line is limited to use for administrative purposes and (2) at least one other telephone line is available for private conversations. Ohio Rev. Code §2933.52(B)(8).[7] Wright contends a reasonable officer could (and he did) believe in good faith that his actions were permitted because he met the criteria of the Ohio statute: (1)

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[7] The Federal Wiretap Act, in turn, exempts a defendant from damages "when the interception was done in good faith reliance on a statutory authorization." 18 U.S.C. §2520(d). Thus, Chief Wright relies on the Ohio statute as providing the exception to the warrant requirements codified in the Federal Wiretap Act.

all of the telephone lines he tapped in the police station were, pursuant to written department policy, supposed to be used only for official purposes; and (2) he did not tap a pay telephone line, which remained available to the police officers for private conversations.

The Court rejects Wright's argument. At about the same time Chief Wright decided to tap the police department telephone lines, another Judge of this Court wrote that a "reasonable police chief would know that instituting a warrantless wiretap. . . is illegal." Lewis v. Village of Minerva, No. 5:94-CV-2508, slip op. at 29 (N.D. Ohio July 12, 1996) (Dowd, J.) (police chief tapped city hall telephone lines in order to intercept conversations of a police sergeant). Plaintiffs have alleged that Chief Wright permitted them to use the telephones for non-administrative purposes (private conversations); thus his contention that written police department policy proscribed private conversations on the tapped telephone lines is contrary to the allegations this Court must accept as true. It is not reasonable for a police chief to rely upon an exception to the warrant requirement when that exception itself contains requirements protecting police officers' ability to be free from unknown warrantless wiretapping. See In re State Police Litigation, 888 F. Supp. 1235, 1267 (D. Conn. 1995), appeal dismissed, 88 F.3d 111 (2nd Cir. 1996) ("[d]efendants. . . fail to establish that the limits of the law enforcement exception [to the wiretap warrant requirement]. . . were not clearly defined")[8]

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[8] Chief Wright argues that, when he took his alleged actions, there existed no case law "on all fours," explicitly saying it was improper to tap internal police department telephones without the police officers' knowledge. Even assuming this is true in light of Lewis, the Supreme Court has cautioned that a Court

Further, the Court notes that although the parties have focused their briefing on the question of qualified immunity with respect to Chief Wright's actions of tapping the telephone lines, plaintiffs have also alleged that Chief Wright "surreptitiously monitored them. . . through other electronic devices and equipment." Complaint at ¶16. With this allegation, plaintiffs are referring to one of the memoranda from Caldwell to Mayor Kurtz, where Caldwell suggests: (1) Chief Wright may have installed intercoms disguised as carbon monoxide detectors; (2) Chief Wright may have used these intercoms to eavesdrop on conversations the plaintiffs reasonably believed were private; and (3) Chief Wright may even have monitored the plaintiffs' conversations from his home, via telephone modem. These allegations may prove false, but the Court must accept them as tree, and defendants do not argue that Chief Wright could have reasonably believed such actions were legal. Thus, the Court cannot say plaintiffs' allegations do not state a claim of a violation of clearly established law.

In sum, based on the allegations contained in the complaint alone, it does not appear that Chief Wright's actions were objectively reasonable when assessed in light of the legal rules that were then clearly established. Accordingly, the motion to dismiss the individual capacity claims against Chief Wright based on qualified immunity is denied.

IT IS SO ORDERED.

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should not hold "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Anderson, 483 U.S. at 640 (emphasis added). Rather, qualified immunity attaches unless "in the light of pre-existing law the unlawfulness [is] apparent." Id.

/s/ _____
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed August 19, 1999]

No. 97-3907

CRAIG BLAKE, ET AL., *Plaintiffs-Appellees*,

v.

FRED WRIGHT, *Defendant-Appellant*.

ORDER

BEFORE: KENNEDY and RYAN Circuit Judges; and HACKETT,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* Hon. Barbara K. Hackett, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

[Filed October 28, 1996]

No. 1:96 CV 2337

CRAIG BLAKE JILL BLAKE 7645 Birchmont Drive Chagrin Falls, Ohio 44022	)	
and	)	JUDGE O'MALLEY
DAN ANDERS 4757 West 11th Street Cleveland, Ohio 44109	)	
and	)	
BRAD BOROWY 10400 Stone Road Valley View, Ohio 44125	)	COMPLAINT (Jury Demand Endorsed Hereon)
and	)	

BRIAN D. DALTON)
MELISSA DALTON)
5815 Chestnut)
Independence, Ohio 44131)
)
and)
)
JOHN DUCAS)
LYNDA DUCAS)
5810 East Pleasant Valley)
Independence, Ohio 44131)
)
and)
)
BRIAN KAVARAS)
6219 E. Sprague Road)
Independence, Ohio 44131)
)
and)
)
DAVID B. KATA)
CONSTANCE M. KATA)
46 Sandy Hill Road)
Sagamore Hills, Ohio 44067)
)
and)
)
JOHN NOVAK)
STACEY NOVAK)
1458 Woodward Avenue)
Lakewood, Ohio 44107)
Plaintiffs,)

FRED WRIGHT)
6800 Brecksville Road)
Independence, Ohio 44131)
)
and)
)
CITY OF INDEPENDENCE)
6800 Brecksville Road)
Independence, Ohio 44131)
Defendants.)
)

INTRODUCTION

This is a civil action brought by police officers serving defendant, City of Independence (hereinafter "Independence"), and their spouses. Plaintiffs maintain that the unlawful wiretapping of their private telephone conversations by Independence's Chief of Police, defendant Fred Wright (hereinafter "Chief Wright"), violated their constitutional and statutory fights. Plaintiffs hereby state as their Complaint against defendants as follows:

JURISDICTION AND VENUE

1. This Court may exercise federal subject matter jurisdiction over the controversy described herein as authorized by 18 U.S.C. §2520(a) (Electronic Communications Privacy Act of 1986), 28 U.S.C. §1343 (Civil Rights Violations), and 28 U.S.C. §1311 (Federal Question). In accordance with 28 U.S.C. §1367, this Court may exercise supplemental jurisdiction over the claims stated herein which arise under Ohio law.

2. The controversy described herein is properly venued in the Northern District of Ohio, Eastern Division, by authority of 28 U.S.C. §1391(a)(2), as all or a substantial part of the events or omissions giving rise to the claims raised herein occurred in this district.

PARTIES

3. At all times herein relevant, plaintiffs were and are residents of the State of Ohio and citizens of the United States. Plaintiffs are police officers currently employed by Independence and their lawful spouses.

4. At all times herein relevant, Fred Wright was and is the Chief of Police of Independence. Chief Wright was and is a resident of the State of Ohio.

5. At all times herein relevant, Independence was and is a political subdivision of the State of Ohio, capable of suing and being sued.

BACKGROUND

6. On July 23, 1996, a DigiVoice, Inc. Digital Recording System was installed at Chief Wright's direction to record all conversations conducted on telephone lines at the Independence Police Department. The only lines which were excluded from this monitoring were a seldom-used pay phone and Chief Wright's own phone.

7. Previously, only "emergency lines" had been monitored. Chief Wright approved and followed a department policy that permitted the officers to use the non-emergency

lines for personal calls. Based upon this longstanding practice and policy, plaintiffs reasonably expected that such conversations would remain private and confidential.

8. As the system was being installed, Chief Wright was explicitly advised by the City's Director of Technical Services, technical services technicians and other city employees that his clandestine monitoring of private conversations of police officers would violate their statutory and constitutional rights. Chief Wright responded that he was not interested in their "opinions". See the Memorandum dated August 11, 1996 which is attached hereto as Exhibit "A".

9. During this period of time, the Director of Technical Services and technical services technicians expressed their fears for their own personal criminal and civil liability in making the physical wire connections. Despite these concerns, Chief Wright ordered the employees to complete the installation. See the Memorandum dated August 11, 1996 which is attached hereto as Exhibit "A".

10. Prior to the completion of the installation, these same individuals requested that Chief Wright seek a formal legal opinion with respect to his intentions to secretly record and monitor the non-emergency lines. Chief Wright refused to do so. See the Memorandum dated August 11, 1996 which is attached hereto as Exhibit "A".

11. As soon as the system became operational, Wright surreptitiously monitored plaintiffs' personal and private conversations without their knowledge or consent. See the August 10, 1996 Memorandum attached hereto and marked as Exhibit "B". Logs generated by the equipment

have confirmed that Wright played these tapes for himself on countless occasions. A portion of these logs are attached hereto and marked as Exhibit "C".

12. During this period of time, the non-emergency lines contained no audible or regular tones which would alert the plaintiffs that their conversations were being recorded.

13. On August 2, 1996, Officer Craig Blake overheard Chief Wright playing a recording in his office of a personal telephone call Blake had previously made on a non-emergency line.

14. Only after this discovery was a formal E-mail memorandum issued on August 7, 1996 to department employees notifying them that their personal and private telephone calls on non-emergency lines were being monitored and recorded. See the attached document marked as Exhibit "D".

15. On August 8, 1996, a detective with the Independence Police Department whose telephone calls had been repeatedly subject to recording and playback by Chief Wright, sought the legal opinion of Cuyahoga County prosecutors. Reportedly, both prosecutors confirmed that such actions were illegal and recommended that the system be disconnected from the non-emergency lines. Later that day, Chief Wright ordered that the system be removed from non-emergency lines.

16. Plaintiffs reasonably believe that Chief Wright has surreptitiously monitored them on other occasions through other electronic devices and equipment. See the attached

Confidential Memorandum dated August 15, 1996 and marked as Exhibit "E".

COUNT I

CIVIL RIGHTS VIOLATIONS

17. Plaintiffs repeat and reallege paragraphs 1 through 16 of the Complaint as if fully rewritten herein.

18. At all times herein relevant, Chief Wright was acting under color of law in his capacity as the Chief of Police of the City of Independence.

19. Without privilege or authority to do so, Chief Wright. knowingly, intentionally, and/or maliciously violated plaintiffs' constitutional and statutory rights. These rights include, without limitation, the fundamental guarantee of privacy and freedom from unwarranted governmental searches and surveillance as afforded by the Fourth and Fourteenth Amendments to the United States Constitution.

20. Wright knew, or reasonably should have known, that his actions were violating plaintiffs' clearly established constitutional and statutory rights. Any reasonable official in Chief Wright's position would have recognized the illegality of these activities or, at the very least, would have inquired as to the propriety of such. As a law enforcement officer, Chief Wright was aware, or should have been aware, of the constitutional prohibitions against monitoring private conversations without a warrant.

21. At all times pertinent to this action, Chief Wright was the final decision-maker with respect to all matters involving the Independence Police Department, including the monitoring of phone lines. Accordingly, Chief Wright's decisions regarding the installation and operation of the DigiVoice Inc. Digital Recording System as detailed herein represented the official policy of Independence.

22. As a direct and proximate result of the surreptitious monitoring and recording of their private conversations without privilege or consent, plaintiffs have directly and proximately suffered considerable and irreparable humiliation, anger, embarrassment, and other damages entitling them to appropriate relief against defendants under 42 USC §1983, and as otherwise allowed by law.

COUNT II

VIOLATIONS OF FEDERAL ELECTRONIC COMMUNICATIONS PRIVACY ACT

23. Plaintiffs repeat and reallege paragraphs 1 through 22 of the Complaint as if fully rewritten herein.

24. At all times herein relevant, both Chief Wright and the City of Independence were subject to the restrictions imposed by the Electronics Communications Privacy Act of 1986, 18 U.S.C.§2510, et seq.

25. In direct violation of 18 U.S.C. §2511(1)(a), Chief Wright intentionally intercepted, endeavored to intercept, and/or procured other persons to intercept or endeavor to intercept, confidential wire, oral, and/or

electronic communications without authority or privilege to do so.

26. In direct violation of 18 U.S.C. §2511 (1)(b), Chief Wright intentionally used, endeavored to use, and/or procured other persons to use or to endeavor to use, electronic, mechanical, and/or other devices to intercept confidential oral communications when (1) such device was affixed to, or otherwise transmitted a signal through a wire, cable, or other like connection used in wire communication and/or (2) Chief Wright knew or had reason to know that such device or any component thereof was being sent through the mail or transported in interstate and foreign commerce.

27. In direct violation of 18 U.S.C. §2511(1)(c), Chief Wright intentionally disclosed, or endeavored to disclose, to other persons the contents of confidential wire, oral, and/or electronic communications, knowing or having reason to know that the information was obtained through the interception of a wire, oral, and/or electronic communication in violation of this subsection.

28. In direct violation of 18 U.S.C. §2511(1)(d), Chief Wright intentionally used or endeavored to use, the contents of confidential wire, oral, or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral, and/or electronic communication in violation of this subsection.

29. Chief Wright's clandestine activities as aforementioned were not sanctioned by any lawful authority. Moreover, these actions were neither necessary for the normal

course of operations at the Independence Police Department nor for the protection of the rights or property of any individual or entity.

30. At all times herein relevant, Chief Wright was acting in his capacity as an official and employee of Independence, thereby rendering the city liable for his conduct.

31. As a direct and proximate result of Chief Wright's unlawful actions, which were undertaken for a tortious and illegal purpose, plaintiffs have suffered considerable and irreparable humiliation, anger, embarrassment, and other damages. Accordingly, defendants are liable to plaintiffs for all appropriate relief available under 18 U.S.C. §2520, and as otherwise allowed by law. Such relief includes, without limitation, the actual damages suffered by plaintiffs and/or the statutory damages of TEN THOUSAND DOLLARS ($10,000.00) per plaintiff per violation against each defendant as imposed by 18 U.S.C. §2520(c)(2)(A) & (B).

COUNT III

VIOLATIONS OF OHIO WIRETAP STATUTES

32. Plaintiffs repeat and reallege paragraphs 1 through 31 of the Complaint as if fully rewritten herein.

33. In direct violation of R.C. §2933.52(A)(1), Chief Wright purposefully intercepted, attempted to intercept, and/or procured other persons to intercept, or attempt to

intercept confidential wire and/or oral communications without privilege or authority to do so.

34. In direct violation of R.C. §2933.52(A)(2), Chief Wright purposefully used, attempted to use, and/or procured other persons to use or attempt to use an interception device to intercept confidential wire and/or oral communications when the interception device was affixed to or otherwise transmitted a signal through a wire, cable, or other similar method of connection used in wire communications.

35. In direct violation of R.C. §2933.52(A)(3), Chief Wright purposefully disclosed or attempted to disclose, to other persons the contents or evidence derived from the contents, of confidential wire and/or oral communications knowing or having reason to know that the contents, or evidence derived from the contents, were obtained through the interception of the wire and/or oral communications in violation of Sections 2933.51 to 2933.66 of the Ohio Revised Code.

36. As a direct and proximate result of Chief Wright's unlawful actions as aforementioned, plaintiffs have suffered considerable and irreparable humiliation, anger, embarrassment, and other damages. Defendants are therefore liable to plaintiffs for all appropriate relief available under R. C. §2933.65(A) and as otherwise allowed by law. This relief includes, without limitation, liquidated damages of TWO HUNDRED DOLLARS ($200.00) per day, per plaintiff, for each day of the violations, actual damages, and punitive damages as authorized by R. C. §2933.65(A)(1) & (2).

PRAYER

WHEREFORE, plaintiffs demand judgment against defendants, jointly and severally, for compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00), punitive damages in the amount of ONE MILLION DOLLARS ($1,000,000.00), and the maximum statutory penalties, together with costs, expenses, and reasonable attorneys fees as allowed by 42 U.S.C. §1988, 18 U.S.C. §2520(b)(3), and R. C. §2933.65(A)(3), in addition to any other legal, equitable, or declaratory relief deemed appropriate.

RESPECTFULLY SUBMITTED,

/s/ _____
W. CRAIG BASHEIN (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

and

/s/ _____
PAUL W. FLOWERS (#0046625)
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 687-0555
Attorneys for Plaintiffs

JURY DEMAND

Plaintiffs hereby request a trial by the maximum number of jurors allowed by law, on all issues for which such is appropriate. *Fed R.. Civ. P. 38(b).*

/s/ _____
W. CRAIG BASHEIN

EXHIBIT A

CONFIDENTIAL

Memorandum

To: MAYOR GREG KURTZ
From: JEFF CALDWELL
Date: AUGUST 11, 1996
Subject: MONITORING AND RECORDING OF NON EMERGENCY POLICE STATION OFFICE TELEPHONE LINES

The attached material was developed thru the efforts of Lt. Dale Christ. Lt. John Nicastro, Sgt. Paul Luikhart and Ptl. Jeff Caldwell. The chronology of events that necessitate our bringing this matter to your attention follows.

During the, installation, planning stages for the DigiVoice logging recorder system Technical Services Director Rick Casentini and I met with Chief Wright to discuss the connection of radio channel audio circuits and telephone lines to the new logging system. Chief Wright informed us that he wanted to tape all radio and "ALL" telephone lines utilized by the police department. I voiced my concerns that the unilateral monitoring and recording of all telephone lines, other than emergency dispatch lines, violated individual Constitutional Rights, specifically the fight to privacy. I further informed the Chief, that, to the best of my knowledge, based on my past law enforcement experience this practice would violate State and Federal wire tapping laws. Director Casentini stated that he felt very uncomfortable and was fearful of criminal and civil liability if he or his personnel

made the physical wire connections and in fact they were party to an illegal act. Chief Wright made it clear that he was not concerned with our opinions in this matter. The Chief stated that the taped lines would be identified with an audible beep tone and that the police station is a place of business which the employees would soon learn to accept and handle their personnel telephone calls accordingly. I questioned the legality of recording the telephone sets that the prisoners are allowed to use to make calls to their lawyers, bondsman and family members. The Chief stated that if the lines were "beeped" it was legal and whatever they said on the phones he could monitor and tape record. This was another area I had major concerns over. Upon leaving the meeting both Director Casentini and I requested that the Chief seek a formal, legal, ruling on what he wished to do with the recording of the non emergency telephone lines in the police station.

As you are aware, the logging recorder was installed and all telephone lines and radio channels to be monitored and recorded were connected by the vendor and the Technical Services technicians. The connections were initiated per the list provided by Chief Wright.

The only telephone which was not to be taped was the wall telephone set in the training room. This phone is mounted on the wall and does not afford an employee the use of a chair or desk. This telephone set is in what one would consider a "public" area of the station allowing for little or no privacy when making a personal telephone call.

The vendor representative, John Boughton. stated to Lt. Christ and I that the system was placed in operation on July 23, 1996 with the majority of telephone lines connected

and subject to live monitoring and recording by Chief Wright and Lt. Kotabish. Mr. Boughton further states that no, dependable or regular beep tone was present on the office lines until August 2. 1996. The existing Dictaphone logging recorder was generating identification tones on the emergency lines to which it was connected, but was not beeping the added non emergency telephone lines. It should be noted that their was no official notification of any police department personnel that their telephone calls were being monitored and recorded until August 7, 1996 when Lt. Kotabish, finally, notified the police personnel, by "E" mail. The attached "E" mail memo informs the employees that the recording is being done to "PROTECT" them. I can assure you that the reasoning, set forth, in this memo did not generate a warm fuzzy feeling among the employees. Police employees who did not have occasion to read the "E" mail still, were unaware of the invasion of privacy. Prior to and after the "E" mail was transmitted to the police department Director Casentini, ITS technicians, DigiVoice technicians and myself observed Chief Wright and Lt. Kotabish monitoring live telephone calls from non emergency, phones in the police station.

An incident which caused considerable upset, unrest and dissension among the police department personnel occurred prior to the official "E" mail notification regarding the logging system. Officer Craig Blake, during his normal tour of duty, entered the police radio room area. While passing the Chiefs office he heard his voice and that of a female whom he had recently shared a telephone conversation with coming from a speaker that the Chief was monitoring. Officer Blake was shocked and disgusted that the Chief and probably others had access to his personal calls. I certainly feel that it would take monumental, effort, on the Chiefs part,

to convenience Officer Blake that he was protecting him by listening to his personal calls. In reality it is quite clear that Chief Wright was violating Officer Blakes right to privacy by his, voyeuristic, conduct. Officer Blake expressed his concerns to Sgt. Luikhart and Lt. Nicastro who had no positive or reassuring answers for Officer Blake as they had been told by Chief Wright, in staff meetings, that the recording would be used "ONLY" to protect the police officers unfounded citizen complaints. Understandably word spread of Officer Blakes concerns throughout the police department. Many officers were contemplating talking to the news media and retaining legal council to seek relief from their perceived invasion of privacy in the work place.

On Wednesday, August 7, I was contacted by Detective Savioli who voiced his concerns about all legal aspects and moral ramifications of the monitoring and taping system. Detective Savioli was also upset that his calls had been taped, without his knowledge and felt that the beep tone on the detective bureau phones was detrimental to operation of the detective bureau. From information the Detective had received he felt that, certain, officers might choose to go public with their concerns if something was not done internally to address this problem. Detective Savioli and I both felt that no legitimate purpose would be served by allowing this situation to fester any longer.

The morning of Thursday, August 8. Detective Savioli met with Cuyahoga County. Prosecutors Edward Walsh and Carmine Marino to ask them for an unofficial opinion and direction in regard to the monitoring and taping of the police station telephone lines. Both prosecutors concurred, in the opinion, that the actions of Chief Wright were illegal and

improper. They agreed to contact your office immediately to advise you of their opinion in this matter.

At approximately 1100 Hrs. on Thursday morning Lt. Kotabish received a call from Chief Wright ordering him to have the phone taping turned off on all phones with the exception of those phones relative to emergency dispatching. This was promptly done by the DigiVoice technicians present at the time. Later in the afternoon Director Casentini ordered the removal, by his technicians, all wire connections between the logging equipment and the telephone system which were not part of the emergency dispatch telephone system.

Friday morning I met with Sgt. Luikhart regarding the feeling of the police officers regarding the situation. Sgt. Luikhart stated that the officers felt that the termination of the taping was only temporary, and would resume as soon as the Chief returned. He further stated that the officers were very upset and had been seeking private legal council. I told Sgt. Luikhart that I felt that the proper way to handle this matter was to gather all available information and evidence, compile it, and present it to you, with the hope, that you could work out a fair and equatable resolution to this matter which would be acceptable to the officers. I asked him if he would relay this to the officers and ask them to wait on any further action until you had an opportunity to act in this matter. He agreed with my suggestion and stated he would relay our thoughts to the rank and file officers. Sgt. Luikhart then asked if I would meet with him, Lt. Christ and Lt. Nicastro. I agreed to this meeting which was held at Lt. Nicastros home.

During the meeting at Lt. Nicastros home all parties agreed that the proper course of action was to work internally

to resolve this problem and attempt to assure the departmental personnel that your office would review this matter. It was agreed that we would inform the officers that any officer who wished to file a complaint in this matter to do so in writing. Lt. Christ and I spent the balance of the day gathering evidence in this matter and printing the attached user activity, logs. I contacted Detective Savioli in regard to his wish to file a formal complaint in this matter. He stated that he would prepare the necessary, documentation and submit it for inclusion with our presentation to you. Please find his written statement and complaint attached. Sgt. Luikhart was to speak with Officer Blake regarding his wish to file a complaint also. We agreed to meet at the police station on Saturday to finalize our investigation and compile our information.

Upon reviewing all evidence and information available on Saturday Lt. Christ and Lt. Nicastro prepared the, attached, letter outlining their evidence and perception of this matter. Both Lieutenants would appreciate the opportunity, at your earliest convenience, to speak with you personally regarding this and other matters which they feel are very important to the future of our police department.

Please be aware that as of this writing Officer Blake has been reluctant to submit a written complaint as he is very concerned about recriminations from Chief Wright. Quite frankly, all of the men involved in this matter, originally expressed reservations about coming forward because of concerns that no action will be taken regarding this matter and the Chief will have free reign to deal with the participants as he sees fit.

I took the liberty of informing all of the participants that I have, personally, trusted you and your judgement for many years and have never regretted that decision. I gave my personal assurances that if these men displayed the courage to come forward and share with you their feelings, concerns and recommendations that you would personally offer assurances that they have no reason to fear reprisals from Chief Wright. I did this without reservation.

In closing I regret to say that in the twenty nine years that I have served as an Independence Police officer. I have never seen our departmental moral so low. All of the framed words on the walls, the messages scrolling across the computer screens, the fancy. door mats and other motivation gimmicks mean nothing to the people when they have lost respect for the man in command. Employees have to have respect for their boss in order to have the will and the motivation to do a quality job and provide credible service to their customers. All, our police employees want is to be trusted, respected and treated equitably and fairly. Once in a while a verbal pat on the back or a letter of commendation means more than all the motivational window dressing in the world. We may not have always agreed with decisions of our past Chiefs of Police but we certainly respected them as men and they always treated us with the same respect. Fred never had the respect of the men as he worked his way up in rank. When he became Chief he had every, opportunity to earn the respect of his people, however, he never quite knew how to do it, it is just not in his style. One thing is for certain after this telephone episode Fred Wright will never garner the trust and respect necessary, for him to effectively command the Independence Police Department. What makes this situation exceptionally regrettable is that the Independence Police

Department is fortunate to have a group of quality people who give their all, and then some, for the people of Independence and the profession they have chosen to serve if they are just afforded a measure of trust and respect from their commander. In our darkest days when the City was short of funds, pay was low, and equipment was poor we always had our pride as police officers, our professionalism and most important, of all, quality leadership. Those factors helped us do a job we have always been proud of. That is one thing that Fred as not been able to undermine and never will, our pride and privelige to serve as Independence Police Officers.

Quality leadership, we need that again Mayor, we need your help.

Please accept my sincerest appreciation for your taking the time to review this material and your consideration of this matter.

EXHIBIT B

INDEPENDENCE POLICE DEPARTMENT

DATE: 08/10/96

TO: MAYOR GREG KURTZ

FROM: LT. DALE CHRIST & LT. JOHN NICASTRO

RE: TAPING AND MONITORING OF PHONE CONVERSATIONS

The purpose of this memorandum is to inform you of a complaint received of phone lines being taped and monitored without knowledge of members of the Police Department. The nature of the complaint involves conduct by Chief Fred Wright and therefore the reason that this matter is directed to your attention.

Our department was made aware that your office was notified by the County Prosecutor of a concern that some legal problem may exist with taping of phone lines beyond emergency lines. On August 8, 1996, Chief Wright notified Lt. Kotabish to have all non-emergency lines removed from taping. This was done.

The taping system used was the DigiVoice logger. Chief Wright had proposed that this system be purchased. He had stated at a staff meeting with the Lieutenants and at other times that the purpose of the system was to protect officers against complaints from citizens on conversations that may have occurred on non-emergency phones. He further stated

that his phone would also be included but later changed his decision and his phone would not be taped. He stated that all officers would be advised that phone lines were being taped and an audible beep would further alert any one to taping of conversation. No guidelines were developed for listening to conversations and at no time were we informed that tape recordings of non-emergency lines would be listened to without a complaint.

On August 8, 1996, Lt. Nicastro and Lt. Christ received training on DigiVoice. In the afternoon of that day, Lt. Christ was helping Lt. Kotabish with setting up ability to print records from DigiVoice. In examining the system, a History Log was found and printed for August 1 (attached). The history shows activity for each user login and what they did.

On August 9, I learned that an officer who wishes to remain anonymous at this time, may have overheard the Chief listening to a phone conversation he made. The officer stated that he was not aware that phone conversations were being taped at that time which was believed to be August 1 or 2. Department members did not receive official notification that the system was functioning until August 7 by e-mail from Lt. Kotabish. According to DigiVoice, the beeps were not installed on the phones until August 3.

Being aware of the above information and with assistance from Jeff Caldwell, the History Logs of the system were examined. On August 2 log (attached), the log showed access by the userid of wright which is Chief Wright's login. Examination of the log revealed that this id accessed 8 non-emergency lines for playback. This was obviously before

notification was made and beeping was on line. From my training on system and knowing how this system works, it was clear that Chief Wright was accessing non-emergency phone lines and listening to parts or all of phone conversations. Although during setup and testing some lines showed problems, the actions of the History Log show that recorded conversations were listened to far greater than required to determine a problem.

Det. Savioli's phone line showed playbacks 17 times. Because he is usually the only one who uses that extension, he was contacted and asked if, on or about August 2, he was aware that his phone line was being taped. He stated that he did not. He was asked if he heard any beeps and he stated that he did not. He stated that the first he learned was the e-mail he received from Lt. Kotabish and at that time believed the system was operational. A written complaint by Det. Savioli is attached.

Conclusion

It is clear that phone conversations were taped prior to employees having knowledge that the system was operational. It is also clear that listening of those conversations occurred by Chief Wright above any need of looking for problems. Finally, Chief Wright stated that the purpose of this system was to protect personnel from complaints but his actions demonstrate that he will listen to conversations taped whether or not there is a complaint or not.

Narrative by Lt. Dale R. Christ

Confidential

EXHIBIT C

Event History Log Repoort

Report for Logger: 76101

Date of report: 08/01/96

07:31:09 Userid KOTABISH Connected To Logger
07:50:32 Userid kotabish Connected To Logger
07:59:47 Userid wright Connected To Logger
08:49:17 Deck 1: Ejecting Tape.
08:54:11 Deck 1: Tape Loaded Successfully for Write No Append.
09:00:47 Deck 1: Ejecting Tape.
09:03:42 Deck 1: Tape Loaded Successfully for Write No Append.
10:57:51 kotabish has started PLAYBACK on input channel #2 CAR TO CA
10:57:51 kotabish has started PLAYBACK on input channel #2 CAR TO CA
1:39:09 serid sysadm Connected To Logger
14:35:17 Userid KOTABISH Connected To Logger
15:25:58 Userid wright Connected To Logger
15:26:30 Userid kruszewski Connected To Logger
15:26:35 wright has started PLAYBACK on input channel #9 S DISPATCH
15:26:47 wright has started PLAYBACK on input channel #9 S DISPATCH
15:27:16 wright has started PLAYBACK on input channel #2 CAR TO CAR
15:27:22 wright has started PLAYBACK on input channel #2 CAR TO CAR

15:27:37 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:27:45 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:27:53 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:01 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:13 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:25 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:32 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:39 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:47 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:28:53 wright has started PLAYBACK on input channel
#2 CAR TO CAR
15:29:34 Userid kruszewski Connected To Logger
15:30:23 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:30:34 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:30:48 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:30:56 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:31:08 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:31:18 wright has started PLAYBACK on input channel
#10 M DISPATCH

15:31:28 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:31:44 wright has started PLAYBACK on input channel
#10 M DISPATCH
15:33:38 wright has started PLAYBACK on input channel
#32 GARAGE
15:33:55 wright has started PLAYBACK on input channel
#32 GARAGE
15:34:03 wright has started PLAYBACK on input channel
#32 GARAGE
15:34:18 wright has started PLAYBACK on input channel
#32 GARAGE
15:36:33 Userid SYSADM Connected To Logger
15:36:52 Userid kruszewski Connected To Logger
15:37:29 Userid SYSADM Connected To Logger

Report for Logger: 76101

Date of report: 08/02/96

08:13:06 Userid wright Connected To Logger
08:14:18 wright has started PLAYBACK on input channel
#32 GARAGE
08:14:34 wright has started PLAYBACK on input channel
#32 GARAGE
08:14:40 wright has started PLAYBACK on input channel
#32 GARAGE
08:24:39 wright has started PLAYBACK on input channel
#32 GARAGE
08:24:52 wright has started PLAYBACK on input channel
#32 GARAGE
08:25:28 wright has started PLAYBACK on input channel
#9 S DISPATCH
08:27:29 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:28:09 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:28:18 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:56:50 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:57:04 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:57:26 wright has started PLAYBACK on input channel
#10 M DISPATCH
08:57:42 wright has started PLAYBACK on input channel
#10 M DISPATCH

08:58:04 wright has started PLAYBACK on input channel #10 M DISPATCH
08:58:37 wright has started PLAYBACK on input channel #10 M DISPATCH
08:58:58 wright has started PLAYBACK on input channel #10 M DISPATCH
08:59:13 wright has started PLAYBACK on input channel #10 M DISPATCH
08:59:25 wright has started PLAYBACK on input channel #10 M DISPATCH
08:59:43 wright has started PLAYBACK on input channel #10 M DISPATCH
08:59:51 wright has started PLAYBACK on input channel #10 M DISPATCH
09:34:57 wright has started PLAYBACK on input channel #32 GARAGE
09:36:05 wright has started PLAYBACK on input channel #32 GARAGE
09:39:30 wright has started PLAYBACK on input channel #32 GARAGE
10:33:41 Userid SYSADM Connected To Logger
10:34:31 SYSADM has started PLAYBACK on input channel #32 GARAGE
10:35:32 SYSADM has started PLAYBACK on input channel #32 GARAGE
10:35:50 SYSADM has started PLAYBACK on input channel #32 GARAGE
10:36:50 wright has started PLAYBACK on input channel #32 GARAGE
10:37:53 Record Stop On Channel 32
10:39:39 Userid SYSADM Connected To Logger
10:41:00 SYSADM has started PLAYBACK on input channel #9 S DISPATCH

10:41:17 SYSADM has started PLAYBACK on input channel #9 S DISPATCH
10:41:41 SYSADM has started PLAYBACK on input channel #9 S DISPATCH
10:42:23 SYSADM has started PLAYBACK on input channel #2 CAR TO CAR
10:42:40 SYSADM has started PLAYBACK on input channel #2 CAR TO CAR
11:05:00 wright has started PLAYBACK on input channel #8 REG. FIRE
11:05:17 wright has started PLAYBACK on input channel #8 REG. FIRE
11:05:23 wright has started PLAYBACK on input channel #8 REG. FIRE
11:05:32 wright has started PLAYBACK on input channel #8 REG. FIRE
11:06:04 wright has started PLAYBACK on input channel #1 PD MAIN
11:06:10 wright has started PLAYBACK on input channel #1 PD MAIN
11:06:17 wright has started PLAYBACK on input channel #1 PD MAIN
11:06:27 wright has started PLAYBACK on input channel #1 PD MAIN
11:06:38 wright has started PLAYBACK on input channel #1 PD MAIN
14:04:25 wright has started PLAYBACK on input channel #25 SCREPTOCK
14:04:40 wright has started PLAYBACK on input channel #25 SCREPTOCK
14:04:46 wright has started PLAYBACK on input channel #25 SCREPTOCK

14:04:56 wright has started PLAYBACK on input channel #25 SCREPTOCK
14:05:27 wright has started PLAYBACK on input channel #25 SCREPTOCK
14:05:36 wright has started PLAYBACK on input channel #25 SCREPTOCK
14:10:54 wright has started PLAYBACK on input channel #28 WEIGHT RM
14:11:04 wright has started PLAYBACK on input channel #28 WEIGHT RM
14:11:35 wright has started PLAYBACK on input channel #28 WEIGHT RM
14:11:57 wright has started PLAYBACK on input channel #27 RANGE
14:12:01 wright has started PLAYBACK on input channel #27 RANGE
14:12:06 wright has started PLAYBACK on input channel #27 RANGE
14:12:30 wright has started PLAYBACK on input channel #20 SAVIOLI
14:12:34 wright has started PLAYBACK on input channel #20 SAVIOLI
14:12:41 wright has started PLAYBACK on input channel #20 SAVIOLI
14:12:49 wright has started PLAYBACK on input channel #20 SAVIOLI
14:12:56 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:02 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:09 wright has started PLAYBACK on input channel #20 SAVIOLI

14:13:24 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:43 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:48 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:52 wright has started PLAYBACK on input channel #20 SAVIOLI
14:13:57 wright has started PLAYBACK on input channel #20 SAVIOLI
14:14:23 wright has started PLAYBACK on input channel #20 SAVIOLI
14:14:29 wright has started PLAYBACK on input channel #20 SAVIOLI
14:14:35 wright has started PLAYBACK on input channel #20 SAVIOLI
14:15:06 wright has started PLAYBACK on input channel #20 SAVIOLI
14:15:12 wright has started PLAYBACK on input channel #20 SAVIOLI
15:59:42 wright has started PLAYBACK on input channel #10 M DISPATCH
15:59:49 wright has started PLAYBACK on input channel #10 M DISPATCH
16:00:05 wright has started PLAYBACK on input channel #10 M DISPATCH
16:00:23 wright has started PLAYBACK on input channel #10 M DISPATCH
16:00:40 wright has started PLAYBACK on input channel #10 M DISPATCH
16:02:36 wright has started PLAYBACK on input channel #15 S911 SET 3

16:03:05 wright has started PLAYBACK on input channel
#15 S911 SET 3
16:03:36 wright has started PLAYBACK on input channel
#15 S911 SET 3
16:03:43 wright has started PLAYBACK on input channel
#15 S911 SET 3
16:04:06 wright has started PLAYBACK on input channel
#15 S911 SET 3
16:05:39 wright has started PLAYBACK on input channel
#11 CAROL P.
16:05:55 wright has started PLAYBACK on input channel
#11 CAROL P.
16:06:05 wright has started PLAYBACK on input channel
#11 CAROL P.
16:06:11 wright has started PLAYBACK on input channel
#11 CAROL P.
16:06:17 wright has started PLAYBACK on input channel
#11 CAROL P.
16:06:27 wright has started PLAYBACK on input channel
#11 CAROL P.
16:08:06 wright has started PLAYBACK on input channel
#19 NICASTRO
16:08:21 wright has started PLAYBACK on input channel
#19 NICASTRO
16:08:59 wright has started PLAYBACK on input channel
#21 LUCIANO
16:09:04 wright has started PLAYBACK on input channel
#21 LUCIANO
16:09:14 wright has started PLAYBACK on input channel
#21 LUCIANO
16:11:21 wright has started PLAYBACK on input channel
#13 FIRE 301

16:11:26 wright has started PLAYBACK on input channel
#13 FIRE 301

EXHIBIT D

FROM : John Kotabish
DATE : 07:31A Wed Aug 7 1996
SUBJECT: VOICE LOGGER

A NEW VOICE LOGGING SYSTEM HAS BEEN INSTALLED AT IPD. THIS SYSTEM RECORDS ALL RADIO AND TELEPHONE CONVERSATIONS AT THE POLICE DEPT. AS YOU MAY HAVE ALREADY GUESSED THIS IS FOR YOUR PROTECTION. IN THE EVENT YOU NEED TO MAKE A PERSONAL PHONE CALL THE TELEPHONE IN THE CLASSROOM IS NOT BEING RECORED. THERE IS A TONE ON THE PHONE LINES THAT ARE BEING RECORDED. IF YOU HAVE ANY QUESTIONS PLEASE ASK.

This Message Was Sent To The Following Recipients:

Original:

Mailed To: p01
Mailed To: p02
Mailed To: p03
Mailed To: p04
Mailed To: p05
Mailed To: p06
Mailed To: p07
Mailed To: p08
Mailed To: p09
Mailed To: pl0
Mailed To: p11
Mailed To: p12
Mailed To: p13

Mailed To: p14
Mailed To: p15
Mailed To: p16
Mailed To: p17
Mailed To: p18
Mailed To: p19
Mailed To: p20
Mailed To: p21
Mailed To: p22
Mailed To: p23
Mailed To: p24
Mailed To: p25
Mailed To: p26
Mailed To: p27
Mailed To: p28
Mailed To: p29
Mailed To: p30
Mailed To: p31
Mailed To: p32
Mailed To: pa1
Mailed To: pa2
Mailed To: pa11
Mailed To: pdl0

EXHIBIT E

CONFIDENTIAL

MEMORANDUM

To: Mayor Greg Kurtz
From: Jeff Caldwell
Date: August 15, 1996

Subject: Information Relating to Police Department Internal Investigation

Please find attached a, high lighted, copy, of a section, of the Independence Police Department Uniform Standards of Conduct which was implemented on September 15, 1994. Lt. Christ informed me that several officers have approached their union lawyer, Mr. Phillips, and requested an opinion from him as to the feasibility of using this as a means of removing Chief Wright from office. In the event that Mr. Phillips feels that this would apply to Chief Wright a number of members of the department intend to sign a formal complaint and present it to your office. This is being discussed, as an alternate plan, to facilitate the removal of the Chief if the current investigation does not provide the necessary evidence and motivation to affect his resignation or dismissal.

Presently the police department personnel have adopted a wait and see attitude. The Lieutenants and Sgt. Luikhart have been encouraging the personnel to keep this within the City and allow for the completion of the internal investigation before they consider any other actions. Everyone is waiting for the outcome of the internal

investigation and the final decision from your office. Various officers, apparently, are still considering civil action against the Chief. The general feeling is that if Chief Wright is removed these officers will not follow thru with litigation. At this point there is a lot of positive talk about the quality of our people and the potential to make the Independence Police Department the best department in the State with the right leadership. All the people seem to be asking for is a Chief that trusts, respects and supports his officers and personnel. As I have suggested I feel that it is critical that you meet with the police department and affirm your feelings toward the people and what you expect from the "new Independence Police Department" in the future. Presently there is a lot of frustration and resentment among the officers towards the Chief and the City in general. At a meeting with you many people will want to vent their frustration and express their concerns. As Safety Director, you, are the top law enforcement officer in our community. Listening and allowing the personnel to "unload" on you will go along way towards putting this unfortunate situation to rest and allowing the department to move forward in a positive manner.

I would like to direct your attention to another situation that I feel needs your urgent attention, considering the present mood within the police department.

When the remodeling of the jail began, as part of the project, an intercom system was installed to allow the dispatchers to, audio, page officers from the dispatch console. This system also allows the dispatchers to select all or individual rooms within the station and listen to "LIVE" conversations taking place in the rooms. The day this system was being installed Sgt. Luikhart and Patrolman Anders were

present in the patrolmans office when a worker was installing a speaker in the ceiling. The installer was asked what he was doing and he replied with the question "didn't they tell you what this was about". The officers present stated they were not told about anything being installed in the building. The worker then told Sgt. Luikart and Patrolman Anders that he was installing a "CARBON MONOXIDE DETECTOR". Imagine their surprise, disgust and paranoia when the CARBON MONOXIDE DETECTOR started talking to them and they found out that the dispatchers can listen to their, private, conversations in all areas of the station from the CO Detector!. The police officers now feel, considering other systems which have recently come to light, that Chief Wright has equipment in his office which can tap into the listening capability of this system. They also have speculated that he has the capability to do this from his residence via a telephone modem. It's like, when does this end!!. I have to tell you, several officers, mentioned to me about being eavesdropped on in non public areas of the station, including the rest rooms. I thought they were kidding or being sarcastic as in the old story of the cameras and Rick and I "bugging" rooms. Yesterday Sgt. Luikhart expressed his concerns to me regarding this latest "technical improvement", I really did not know what he was talking about. I called Ricky and asked him what he knew about this. Rick told me he knew a system was installed, however, he has never received any training our technical literature regarding the operation of the system. Rick stated to me that he approved the purchase and installation of this system based on the following conditions. When the system is activated in the listening or monitoring mode a "discernable" tone be emitted by the ceiling speakers and that this tone be transmitted every 15 seconds while the live monitoring is in progress. Also a red light which is

present on "most" devices be lit at all times that the monitoring is taking place.

After speaking with Ricky I met Sgt. Luikhart at the station and asked him to show me how this system worked. We went to the dispatch console and he showed me the controller and then we went to the patrolmans office. Sgt. Luikhart called dispatcher Jasko on the phone and asked him to enable the monitoring mode for the room. We heard a "low" tone, Bryan Jasko spoke to us and we spoke to him. Bryan indicated that he could hear us loud and clear at his end. The monitoring mode was left enabled for approximately one minute and no tones other than the first tone were audible in the area. No red light was visible. We tried areas in other offices and the hallway. All areas worked the same way, no tone, no light. In the locker room there is a wall speaker which looks like a radio speaker hung on the wall, there is no red light installed on this speaker. Once the listening mode is activated the people being listened to have no way of knowing that their conversations are being monitored. My examination of the paging/listening system revealed that in offices, bathrooms, locker rooms, training rooms, workout rooms and hallways no individual can hold a conversation without the potential for this conversation to be clandestinely monitored. I have my doubts that the Chief had the vender install a control point in his office or that he can access the system via a telephone modem, well I ..... , but I bet that, at this point in time, it would be real hard to convenience the troops that the Chief is, once again, protecting their best interests.

After examining the operation of the system I met with Rick and appraised him of the situation. Ricky, couldn't believe it either, that on top of all the harangue over the

recording system that the Chief has allowed this system to be in operation as it is. We both agreed that it is a bad situation and is certainly not helping with the moral of the police department. I also feel that, once again, the Chief has damaged mine and Ricks credibility as technicians. I am sure that some officers feel that Rick and I had something to do with installing the system and the way it operates. They probably figure your in on it too.

I, strongly, recommend that you instruct the Director of Technical Services to contact the vendor and acquire all necessary instructions and literature on how this system operates. I would further encourage, at your earliest convenience, that you order the Police Chief to contact the vendor and have them disable the monitoring capability of this system until the current invasion of privacy issues have been resolved with the members of the police department. I would urge that Rick be present when the vendor disables the system to insure that it is done properly and completely. It would help a lot if all members of the department were advised that the monitoring capability of this system has been disabled and that the paging only feature is operational. Sgt. Luikhart indicated to me that he felt that, in the future, when the element of trust has been re-established within the police department the talk back feature of this system might be positive, however, at the present time it is doing nothing but angering the men and promoting talk of law suits and media exposure. Forgive me for being redundant in my stressing, urgency, in resolution of this matter as I read this as a festering, volatile issue.

It is interesting to note and typical of Fred Wrights, time proven, methods that when he first came back after the

termination of the telephone recording system he was in the lets make friends mode with everyone. He inquired as to how everyone was as he spoke to them. He went as far as to asked Ricky and Savioli how they were feeling, now that's scary. As time has progressed he has now progressed to his I will get to the bottom of this and people will pay for their deeds mode. He commented to one of the Lieutenants that he "knows who the messengers are". He has been asking people if they know what he is going thru and stating that "it will pass". The message he is sending, as perceived by the troops, is that he is going to weather this little crisis and God help everybody when he feels he is in the clear. The Chief called Sgt. Luikart in to his office and told him that he is not following the mission of the department by not controlling the men under his command. The Chief advised Sgt. Luikhart that his shift was making derogatory comments regarding the Chief and the present unrest in the department. Chief Wright made other references as to why he was unhappy with the Sergeant. Sgt. Luikhart challenged the Chief on his statements and the meeting ended on a less than positive note. Sgt. Luikhart walked out of the Chiefs office leaving the Chief mumbling to himself in an agitated state. I encouraged Sgt. Luikhart to contact your secretary and ask her to see if you could make some lime available for him to speak with you. He has mentioned a number of thoughts and feelings which I feel you should hear from him, personally. Paul has a lot of good ideas and a positive attitude towards the future direction of the department.

One last item. A considerable amount of discussion is taking place regarding the appointment of a new Chief and whom that should be. Lieutenant Niscastro is the candidate of choice. I would like you to be aware that feelings are very

strong along these lines. A number of officers have approached me and asked me my feelings on this issue. My position has been that the discussion is certainly premature, however, no harm is done looking to the future.

A number of officers have expressed a desire to draft a letter to you expressing their desire to have John Nicastro appointed Chief. They intend to acquire the signatures of all officers who agree with this recommendation. I believe a majority response can be expected. My wife and I fully intend to lend our support to John should the occasion arise. My recommendation, in this regard, has been to hold off on any formal action until a decision regarding Chief Wright has been reached. I have expressed, my feeling, that if the Chiefs position is vacated you would appreciate the input from all concerned parties as to their recommendations in regard to who will lead our department and any suggestions that will improve the police department.

Everyone is aware of the time which your have recently devoted to the present problems affecting the police department. Rest assured it has been noticed and is appreciated by all concerned. Your involvement has provided a basis for hope and encouragement to those affected by this unfortunate situation. Please accept my personal thanks and appreciation for your attention to my correspondence.

Complaint - 10/28/96

INDEPENDENCE POLICE

DEPARTMENT

UNIFORM STANDARDS OF

CONDUCT

EFFECTIVE DATE: 09/15/94

CONDUCT STANDARD

Business necessity for this standard

The need to work in a cooperative manner with employees of other agencies and public officials is self-evident. In today's society, the effective, efficient and safe delivery of public services requires a coordinated effort of all employees and public service agencies.

09 Supervisors Shall Display Respect Towards Subordinate Ranked Personnel

Supervisors shall treat subordinates with the same courtesy and respect that Is required of subordinates to display to supervisors. Criticisms of an employee or en employee's performance will be made directly to the subordinate and, when practicable, in a private setting.

Business necessity for this standard

Employees who are treated with respect, concern, and courtesy are typically better performers and have higher morale. Supervisors who respect subordinates and limit criticisms to unsatisfactory work performances obtain higher levels of employee cooperation then those who direct their criticisms at the employee's person.

Because supervisors are management's representatives, higher levels of performance are expected of them in this area; and they are expected to set a positive example for others to follow.

10 Discriminating or Establishing Patterns of Discrimination in the Performance of Duties

In words, deeds, gestures, performance of jobs, duties, tasks and delivery of services, employees shall not discriminate; nor shall they establish a pattern of adverse impact in the delivery of services when such discrimination has a basis in such areas as a person's sex, ethnic background, race, color, national origin, lifestyle, preferred sexual orientation, religion, criminal history, age, disability or social status.

[3.1.13]

Business necessity for this standard

Public employees must strive to maintain neutrality in the performance of duties and delivery of services to all persons regardless of their personal characteristics social status or work conditions. Discriminatory services and treatment of all citizens creates a serious threat to the well-being of all as well as exposes this Department to the possibility of civil and/or criminal action.

11 Dishonesty or Untruthfulness

Employees shall not lie, give misleading information, or falsify written or verbal communications in official reports or in their actions with another person or organization when such information may be relied upon because of the employee's position or affiliation with this Department.

Business necessity for this standard

Public work is based on public trust and confidence. Performance standards in this area are much higher for public employees than the ordinary citizen.

12 Displaying Competent Performance and Achieving Competent Performance Results

Employees shall willfully display competent performance and consistently achieve competent performance results on all assigned or assumed job responsibilities, duties and tasks.

Business necessity for this standard

In a public safety organization where much of the work effort involves citizens' liberties and physical safety, incompetent performance cannot be tolerated. When incompetent performance is discovered, its source must be dealt with effectively and efficiently or the potential of damage or injury exists. When this potential occurs, the organization runs the risk of incurring severe criticism, the loss of public trust and the creation of civil liability.

[3.1.14]

ENFORCEMENT GUIDELINE

09 Supervisors Shall Display Respect Toward Subordinate-Ranked Personnel

Progressive discipline up to and including termination.

10 Discriminating or Establishing Patterns of Discrimination in the performance of Duties

Progressive discipline up to and including termination.

11 Dishonesty or Untruthfulness

Termination if the act results in public embarrassment and costly administrative action to correct. Termination if, as a result of the action, the employee loses work credibility and it is no longer reasonable to expect that the employee can be effective or efficient in his or her current job assignment.

Progressive discipline up to end including termination for other circumstances or conditions.

12 Displaying Competent Performance end Achieving Competent Performance Results

Task removal and retraining in those areas of incompetence if the employee's performance is satisfactory in all other areas and he or she does not have an ongoing or serious disciplinary problem.

Reassignment of tasks or duties if the employee's performance in management's judgement, is satisfactory in all other areas

and he/she does not have on ongoing or serious disciplinary problem.

Progressive discipline up to and including dismissal.

13 Establishing Patterns of Absenteeism

Progressive disciplinary action up to end including termination.

[3. I .23]

14 Physical and Mental Readiness to Perform Primary Duties and Tasks

Termination if public image is severely damaged or the costs of management to respond to public criticism.

Discipline up to and including termination when other conditions exist.

15 Giving a Full Day's Work for a Full Day's Pay

Termination if public image is severely damaged or the costs of management to respond to public criticism.

Discipline up to and including termination when other conditions exist.

16 Insubordination

Acts of insubordination are cardinal offenses and they may be committed directly, by way of verbal refusal, as well as constructively, expressing an attitude about a performance and then not performing competently. Such cases will be handled on an individual basis and disciplinary action up to and including discharge may be administered.

17 Knowing, Observing, and Obeying All Directives, Rules, Policies, Procedures, Practices and Traditions

Termination if the results of such deviations cause injury to another or severe damage to property.

Progressive discipline up to and including termination for all other conditions.

[3.1.24]

Supreme Court, U.S.
FILED
DEC 17
CLERK

(2)

No. 99-848

IN THE

Supreme Court of the United States

CRAIG BLAKE, *et al.*,

Petitioners,

v.

FRED WRIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Should this Court consider overturning longstanding precedent and rule that the doctrine of qualified immunity may be applied only to constitutional claims, and not statutory claims, even where both claims arise from the same operative facts in the same case?

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STATEMENT OF THE CASE

This suit, filed by Petitioners, a group of police officers and their spouses, is based upon allegations that the installation and testing of a customary digital voice recording system in the City of Independence, Ohio's Police and Fire Departments violated their rights under the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.* ("Title III"), 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments, and the Ohio Wiretap Act, Ohio Revised Code §§ 2933.51, *et seq.* On October 28, 1996, Petitioners filed their suit against the City of Independence ("the City") and Respondent, Fred Wright ("Wright"), then Chief of Police, in his official and individual capacities, in the United States District Court for the Northern District of Ohio.

On November 18, 1996, Wright filed a Motion for a More Definite Statement and/or Motion to Dismiss, in his individual capacity, in the District Court. Wright asserted the affirmative defense of qualified immunity as grounds to dismiss all of the claims against him in his individual capacity. On July 16, 1997, the District Court denied Wright's motion to dismiss. Wright then appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit on July 28, 1997. In an Opinion issued June 15, 1999, the Sixth Circuit reversed the decision of the District Court and found that Wright, in his individual capacity, was entitled to qualified immunity on all of the claims, both constitutional and statutory, except for a claim raised in Paragraph 16 of the Complaint which related to actions other than those involving the digital voice logging system.

Petitioners filed a Motion for Rehearing or Rehearing En Banc with the Sixth Circuit, raising, for the *first time*,

the issue of application of qualified immunity to Title III statutory claims. The Sixth Circuit denied Petitioners' Motion for Rehearing and for Rehearing En Banc on August 19, 1999. Petitioners now seek a writ of certiorari from this Court.

SUMMARY OF ARGUMENT

In seeking to invoke this Court's discretionary jurisdiction, Petitioners fail to present any compelling reason for this Court to grant a writ of certiorari in this case. Petitioners attempt to conjure up compelling reasons to grant a writ by misconstruing the state of the law on the doctrine of qualified immunity and exaggerating the implications of the Sixth Circuit's decision. It is clear from this Court's precedent that qualified immunity is applicable to statutory claims, particularly where the statutory and constitutional claims are based on the same operative facts. Federal appellate and district courts have been applying qualified immunity to statutory claims for years. The Sixth Circuit's opinion was not, in any way, "revolutionary" as Petitioners suggest.

While Petitioners predict that applying qualified immunity to statutory claims will result in excessive interlocutory appeals and special treatment for public officials, qualified immunity has been applicable to statutory claims ever since *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), was decided 17 years ago. Obviously, Petitioners' predictions of doom are overstated, as the lower courts have dealt with qualified immunity on statutory claims for years without such results. To the contrary, if Petitioners' proposed interpretation of the qualified immunity doctrine is accepted, the judicial

system will be disrupted and public officials will be subject to unfair results and bifurcated proceedings if they are denied qualified immunity on statutory claims yet granted qualified immunity for constitutional claims based on the same operative facts in the same case. The promise of qualified immunity for public officials who act in good faith will be denied and the longstanding policy underlying qualified immunity to protect public officials from the burdens of litigation will be completely undermined.

Petitioners' alternative argument presents no viable issue at all because it has been waived and in any case is based on an erroneous premise. Petitioners' argument that qualified immunity should be denied when a statute is unambiguous fails because, in this case, the Sixth Circuit held that Title III and the Ohio Wiretap Act are not clear as applied to the facts presented here.

Because Petitioners' request for a writ of certiorari presents no important federal questions or compelling reasons for certiorari review, their Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The doctrine of qualified immunity has been previously recognized as applying to statutory claims as well as constitutional claims and any purported conflict between the Sixth Circuit opinion and the District of Columbia Circuit's opinion on this issue does not warrant the granting of a writ of certiorari.

Petitioners seek to have this Court consider their contention that qualified immunity should not apply to

statutory claims, but only to constitutional claims. Although the Sixth Circuit addressed this issue in its Opinion, Petitioners never raised this issue either in their Brief to the Sixth Circuit or in the District Court. As such, it is evident that Petitioners all along assumed that Wright could obtain qualified immunity on both the constitutional and Title III claims, as they never questioned this issue until after the Sixth Circuit had rendered its decision. This fact, in and of itself, negates Petitioners' contention that the Sixth Circuit's decision was an extension of the qualified immunity doctrine, as they themselves never questioned its application below.

The history of the doctrine of qualified immunity reveals that it has long been widely accepted that its protections apply to both statutory and constitutional claims against public officials, especially where the claims stem from the same operative facts. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 410, this Court specifically held that qualified immunity applied to statutory claims, stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Id.* (emphasis added). In *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984), this Court also held that a public official does not lose qualified immunity on a constitutional claim merely because the official violated some statutory provision. *Id.* In so doing, the Court stated that qualified immunity applied to underlying statutory claims:

> [O]fficials may lose their immunity by violating "clearly established statutory . . . rights." 457 U.S., at 818, 73 L. Ed. 2d 396, 102 S. Ct 2727.

> This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in Harlow itself, see id., at 820, n. 36, 73 L. Ed. 2d 396, 102 S. Ct. 2727, and as in many § 1983 suits, see e.g., Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes.) For the reasons that we discuss, *officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation.* Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages.

Id. at 194, n.12, 104 S. Ct. 3012, 82 L. Ed. 2d at 149 (emphasis added).

Petitioners' claim that no court has interpreted the language of *Harlow* as the Sixth Circuit has herein is belied by various decisions granting qualified immunity to public officials facing statutory claims. *See Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998) (applying qualified immunity to ADA and Section 504 claims); *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998) (applying qualified immunity to federal claims based upon § 1983 and the Federal Wiretap Act); and *Sinclair v. Schriber*, 916 F.2d 1109, 1114 (6th Cir. 1990) (noting that the district court found qualified immunity on Title III and Fourth Amendment claims and citing *Davis*). The Sixth Circuit opinion did not extend qualified immunity in an unprecedented manner in this case, but rather applied

the doctrine in accordance with logic, fairness and longstanding precedent. As such, a writ of certiorari is not appropriate on this issue because qualified immunity is, and has been for years, applicable in like circumstances.

Petitioners conjure up various suggested evils that they claim will befall the judicial system if this Court does not act. They claim that public officials will seek qualified immunity on all statutory claims, will seek interlocutory appeals in hoards when they are denied qualified immunity on these claims, and will unduly delay litigation. (Petition at p. 12). Petitioners' predictions of horrendous results are incorrect, as in the 17 years that qualified immunity has existed in its current form, courts have readily resolved qualified immunity questions on both constitutional and statutory claims without overburdening the judicial system.

Petitioners' broad overstatements need not be addressed by this Court under the facts of this case. This case does *not* present the issue of whether qualified immunity should be granted when only a statutory claim is raised against a public official, and thus this Court need not speculate on the consequences of a far-reaching rule that extends beyond the confines of the facts of this case. In the Complaint, Wright is alleged to have violated both constitutional and statutory provisions, and these alleged violations are based on the very same operative facts. Petitioners cannot and do not dispute that Wright can seek qualified immunity on the constitutional claims. Petitioners fail to recognize that their Fourth and Fourteenth Amendment claims are also "statutory" claims because they are based on a federal statute, 42 U.S.C. § 1983. Therefore, Petitioners' argument that qualified immunity should be denied on the Title III claim because it is a statutory claim fails to account for the fact that the constitutional claims are also based on a federal statute.

Wright is entitled to qualified immunity on the Title III claim because otherwise he would be obligated to proceed to discovery and trial on the statutory claim, even though it is based on the very same actions as the constitutional claims for which he is immune from such burdens. The Sixth Circuit opinion is an example of common sense application of the protections of qualified immunity which are intended to relieve public officials of the burdens of litigation. Contrary to Petitioners' contentions, not granting qualified immunity on the statutory claims would in fact cause greater chaos and lead to absurd results in suits involving public officials. If public officials in Wright's position are not entitled to qualified immunity on a statutory claim when it is based on the exact same facts as a constitutional claim, artful plaintiffs' counsel will attempt to use the back door to personally sue public officials by always pleading a federal statutory claim, along with any constitutional claims. Bifurcated and illogical paths would be created in which public officials will be subjected to discovery and trial on federal statutory claims, but granted qualified immunity on the constitutional claims based on the exact same conduct. This result will negate the policy upon which the doctrine of qualified immunity is based. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 425 (1985) ("The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

The doctrine of qualified immunity was designed to treat public officials differently and to provide them with an *extra* layer of protection from claims made against them personally for their official actions. Qualified immunity is intended to "protect [public officials] 'from undue interference with their

duties and from potentially disabling threats of liability.' " *Elder v. Holloway*, 510 U.S. 510, 514, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) (citing *Harlow*, 457 U.S. at 806, 102 S. Ct. 2727, 73 L. Ed. 2d. at 403). *See also Harlow*, 457 U.S. 814, 102 S. Ct. 2727, 73 L. Ed. 2d at 408 (qualified immunity necessary to avoid the social costs of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."). Thus, Petitioners' argument that the Sixth Circuit's holding will create an unfair dichotomy in which public officials receive special treatment has already been rejected by this Court.

Petitioners' assertion that the Sixth Circuit's decision conflicts with a D.C. Circuit decision, *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998), does not justify a writ of certiorari. It is not at all clear that *Berry* is directly contrary to the Sixth Circuit decision. In fact, the court in *Berry* acknowledged that it had previously recognized qualified immunity against *both* constitutional and statutory claims, specifically Title III statutory claims. *Id.* at 1013. Because the *Berry* decision concedes that qualified immunity may apply to statutory claims, even, in some circumstances, claims under Title III, it cannot be said to be directly contrary to the Sixth Circuit's decision. Furthermore, Petitioners' reliance on the *Berry* decision as grounds for a writ of certiorari is unjustified as the *Berry* decision is a complete aberration from established qualified immunity doctrine. One anomalous decision, in contrast to well-established Supreme Court precedent, does not justify this Court's allocation of its limited time and resources to consideration of this issue.

Effectively conceding that their first argument is unconvincing, Petitioners raise an alternative argument

acknowledging that qualified immunity applies to statutory claims but asserting, in novel fashion, that the doctrine should not be applied if, in someone's mind, the statute is "unambiguous." As an initial matter, because this argument was never raised or addressed in the courts below, Petitioners have waived this argument. *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973).

Moreover, Petitioners' suggested standard is not applicable in this case, as is clear from the Sixth Circuit's decision itself. The Sixth Circuit stated:

> This court has not discovered case law that discusses the good faith defense of Title III with respect to a similar statutory provision, let alone the administrative exception of the Ohio statute. Nor has Ohio or federal law fully explained the meaning of "statutory authorization" under Title III.

(Sixth Circuit Decision at p. 17.) Since the Sixth Circuit found that Title III and the Ohio Wiretap Act have not been fully clarified, particularly as they apply to the facts at issue here, Petitioners' premise contains a fatal flaw. Indeed, the Sixth Circuit is not the only court to have found provisions of the Federal Wiretap Act unclear. In *Forsyth v. Barr*, 19 F.3d 1527, 1543 (5th Cir. 1994), the court remarked in its opinion that "Because the plain wording of the [Wiretap] Act does not address the situation at hand, we must engage in statutory construction. In so doing we are aware . . . that construction of the Federal Wiretap Act is fraught with trip wires." *See also Fleming v. United States*, 547 F. 2d 872, 873 (5th Cir. 1977) ("Our analysis . . . makes us confident of only one conclusion: the statute is not a model of clarity").

CONCLUSION

None of the arguments set forth by Petitioners in support of a writ of certiorari present viable or compelling reasons to warrant a writ. Petitioners' argument that qualified immunity should not apply to statutory claims need not be addressed in this case where Wright is alleged to have violated both constitutional and statutory claims. It would be illogical to grant qualified immunity on the constitutional claims but not on the statutory claims, thereby forcing Wright to fully litigate this case, when both claims are based on the same operative facts. Moreover, this Court has indicated that qualified immunity is available on statutory claims. Finally, Petitioners' claim that qualified immunity should only apply to ambiguous statutes fails here because the Sixth Circuit in fact found that Title III and the Ohio Wiretap Act, as applicable to the facts of this case, have not been fully explained. Because the Sixth Circuit's opinion is consistent with Supreme Court precedent and because it does not raise any important federal questions of a compelling nature, a writ of certiorari is not warranted. For these reasons, a writ of certiorari is not justified, and Petitioners' request should be denied.

Respectfully submitted,

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